Supreme Court, U.S.
FILED

09-923 FEB 1 - 2010

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No.

In the Supreme Court of the United States

MAHER ARAR,
PETITIONER

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether federal officials who conspired with Syrian officials to subject an individual in U.S. custody in the United States to torture in Syria may be sued for damages, particularly where the federal officials also intentionally obstructed the victim's access to the judicial remedy provided by Congress to prevent torture, and damages are the only remedy available to vindicate the victim's rights.

2. Whether the court of appeals erred in dismissing petitioner's claim under the Torture Victim Protection Act, 28 U.S.C. § 1350 note, by concluding, in conflict with decisions of this Court and several courts of appeals, that willful participation in joint action with government officials is insufficient to constitute action under "color of law" of that jurisdiction, where defendants are alleged to have conspired with Syrian officials to have petitioner tortured in Syria, delivered him to his torturers, provided them with questions to ask him, and obtained the answers tortured out of him.

3. Whether the court of appeals erred in dismissing petitioner's *Bivens* claim for obstruction of access to court on the ground that he did not sufficiently identify the particular defendants who took part in blocking his access to court, where petitioner identified a series of concrete steps taken to keep him from court, specifically identified each individual defendants' role in the larger conspiracy, was detained during the relevant events and therefore could not identify the defendants' identities more particularly, and had no opportunity to pursue discovery.

PARTIES TO THE PROCEEDINGS

Petitioner:

Maher Arar was plaintiff in the district court and appellant in the court of appeals, and is petitioner in this Court.

Respondents:

The following parties were defendants in their individual capacities in the district court and appellees in the court of appeals, and are respondents in this Court:

John Ashcroft, former Attorney General of the United States;

Larry D. Thompson, former Deputy Attorney General;

J. Scott Blackman, former Regional Director of the Regional Office of Immigration and Naturalization Services;

Edward J. McElroy, former District Director of Immigration and Naturalization Services for the New York District;

Robert Mueller, Director of the Federal Bureau of Investigation;

James W. Ziglar, former Commissioner for Immigration and Naturalization Services, United States; and

John Doe 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents.

The following parties were defendants in their official capacities in the district court and appellees in the court of appeals, but petitioner is not seeking review of his claim for injunctive and declaratory relief:

John Ashcroft, Attorney General of the United States;

Tom Ridge, Secretary of Homeland Security;

Robert Mueller, Director of the Federal Bureau of Investigation John Ashcroft, former Attorney General of the United States; and

Paula Corrigan, Regional Director of Immigration and Customs Enforcement.

Amici Curiae:

The following *Amici Curiae* presented their views to the Court of Appeals Panel in support of Maher Arar:

Retired Federal Judges: the Honorable John J. Gibbons, the Honorable Shirley M. Hufstedler, the Honorable Nathaniel R. Jones, the Honorable Timothy K. Lewis, the Honorable H. Lee Sarokin, the Honorable William S. Sessions, and the Honorable Patricia M. Wald;

United States and Canadian Scholars: Payam Akhavan, Janet Cooper Alexander, Erwin Che-

merinsky, Irwin Cotler, Norman Dorsen, Thomas A. Eaton, David M. Golove, Helen Hershkoff, Patrick Monahan, Trevor W. Morrison, Sheldon H. Nahmod, Bruce Ryder, David Shapiro, and Michael L. Wells;

The Center for Justice and Accountability, International Federation for Human Rights, Minnesota Advocates for Human Rights, World Organization Against Torture, David M. Crane, Scott Horton, Michael P. Scharf, Leila Nadya Sadat, and David Weissbrodt; and

The Center for International Human Rights of Northwestern University School of Law.

The following *Amici* presented their views to the Court of Appeals on Rehearing *en banc* in support of Maher Arar:

Retired Federal Judges: the Honorable John J. Gibbons, the Honorable Shirley M. Hufstedler, the Honorable Nathaniel R. Jones, the Honorable Timothy K. Lewis, the Honorable H. Lee Sarokin, the Honorable William S. Sessions, and the Honorable Patricia M. Wald;

Professors of Law: Norman Dorsen, Helen Hershkoff, Frank Michelman, Burt Neuborne, and David Shapiro;

Law professors Janet Cooper Alexander, Erwin Chemerinsky, Thomas A. Eaton, Amanda Frost, Martha L. Minow, Jeremiah Smith, Sheldon H. Nahmod, Edward A. Purcell, Jr., Michel Rosen-

feld, Carl Tobias, Laurence H. Tribe, William Van Alstyne, and Steven Vladeck;

The American Civil Liberties Union and the New York Civil Liberties Union;

The NAACP Legal Defense & Educational Fund, Inc.; and

The Redress Trust ("REDRESS").

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of a corporation's stock the disclosure of which is required under Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the *en banc* court of appeals (App. A, 1a-194a) is reported at 585 F.3d 559. The opinion of the panel (App. B, 195a-334a) is reported at 532 F.3d 157. The opinion of the district court (App. C, 335a-426a) is reported at 414 F. Supp. 2d 250.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, as Arar's case presented federal questions. The judgment of the *en banc* court of appeals was entered on November 2, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." The Torture Victim Protection Act of 1991 (TVPA), Pub. L. 102-256, 106 Stat. 73 (28 U.S.C. § 1350 note), provides in pertinent part that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual." The TVPA is reproduced at App. D, 427a-430a. The Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, § 2242, codified at 112 Stat. 2681, 822-23 (8 U.S.C. § 1231 note), is reproduced at App. E,

431a-433a. Relevant portions of the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT), *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987), are reproduced at App. E, 434a-437a.

STATEMENT

1. This petition seeks review of a 7-4 *en banc* decision of the Second Circuit, affirming the dismissal on the pleadings of a suit brought by petitioner Maher Arar, a Canadian citizen, which sought damages from federal officials for delivering him from their custody in the United States to Syria for purposes of subjecting him to torture and arbitrary detention. The majority's legal reasoning and result, which left Arar without any remedy for his claims, and are contrary to the State Department's representation that *Bivens* actions provide remedies for torture by federal officials,[1] were so controversial that they inspired four dissenting opinions spanning 124 pages. App. A, 54a-194a.

The core allegations of the complaint were summarized by Judge Parker in his dissent, joined in by each of the other dissenting judges:

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[1] U.S. DEP'T OF STATE, U.S. DEP'T OF STATE, UNITED STATES WRITTEN RESPONSE TO QUESTIONS ASKED BY THE UNITED NATIONS COMMITTEE AGAINST TORTURE 10 (bullet-point 5) (April 28, 2006), *available at* http://www.state.gov/documents/organization/68662.pdf; U.S. Dep't of State, United States Report to the Committee Against Torture, ¶ 51 (bullet-point 5), U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf.

> Maher Arar credibly alleges that United States officials conspired to ship him from American soil, where the Constitution and our laws apply, to Syria, where they do not, so that Syrian agents could torture him at federal officials' direction and behest. He also credibly alleges that, to accomplish this unlawful objective, agents of our government actively obstructed his access to this very Court and the protections established by Congress.

App. A, 125a (citation omitted). In Judge Parker's view, the majority decision "distorts the system of checks and balances essential to the rule of law, and it trivializes the judiciary's role in these arenas." App. A, 126a.

The Second Circuit decision warrants this Court's review for three reasons. First, the *en banc* majority radically departed from this Court's *Bivens* jurisprudence, erecting an unprecedented and near-insurmountable barrier against *Bivens* relief by expressly refusing to consider any factors in favor of a *Bivens* action, and holding that *any* reason for hesitation compels dismissal. It did so, moreover, in a case where defendants are alleged not only to have subjected Arar to torture, but to have denied him access to the judicial relief that Congress guaranteed him to prevent him being sent to torture.

Second, the court misinterpreted the Torture Victim Protection Act to deny relief even where federal officials are alleged to have conspired with foreign officials to subject Arar to torture under "color of law" of a

foreign nation. That conclusion conflicts with decisions of this Court and other courts holding that "willful participation in joint action" is sufficient to constitute action "under color of law."

Third, the court imposed unwarranted and impermissible pleading requirements, contrary to this Court's recent decisions in *Bell Atlantic Co. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), in upholding dismissal of Arar's access to court claim for failure to specifically identify the particular defendants who obstructed such access.

2. Defendant federal officials intercepted petitioner in September 2002, while he was changing planes at John F. Kennedy International Airport on his way home to Canada. Erroneously suspecting that he might be associated with terrorists or terrorist organizations, they detained him in New York for 13 days, and ultimately decided to remove him, not to Canada—his country of citizenship, residence, and destination—but to Syria, a country that the State Department criticizes annually for its systematic use of torture as an interrogation tactic.[2] Defendants sent Arar to Syria, the complaint alleges, so that Syrian officials could detain him indefinitely without charge and interrogate him using torture. App. G, 441a.

To ensure that a court would not interfere with their illegal plan, defendants conspired to obstruct Arar's ability to obtain the judicial protection Congress

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[2] Arar was born in Syria, and therefore is a dual national. But he moved to Canada with his family when he was a teenager, and has lived in Canada ever since. He objected at every turn to being sent to Syria, asserting that he would be tortured there.

provided to ensure that individuals not be sent to countries where they face a risk of torture. They initially denied Arar's repeated requests for counsel and even to make a phone call. App. G, 452a-455a. When he was finally able to meet with a lawyer—ten days after he was detained—defendants hastily scheduled an extraordinary six-hour proceeding the very next day—*starting at 9 PM on a Sunday evening*—ostensibly to examine whether he had a credible fear of torture in Syria. App. G, 456a-457a.

At that proceeding, which was closely coordinated with officials in Washington, D.C., (App. G, 460a; App. A, 140a-141a), defendants falsely told Arar that his lawyer had chosen not to participate. In fact, the only "notice" provided Arar's lawyer was a message left on her office voicemail that Sunday evening by defendant McElroy. App. G, 456a. Immediately upon getting the message Monday morning, Arar's attorney called the Immigration and Naturalization Service, who lied to her, claiming that Arar was in route to New Jersey. App. G, 456a-457a. In reality, Arar remained in New York until about 4:00 a.m. Tuesday morning, when he was taken out of his cell in chains and shackles, served with his "Final Notice of Inadmissibility," a prerequisite to a petition for review in federal court, and secretly transported out of the country on a federally chartered jet. App. G, 458a; App. G, Ex. D, 581a-590a. Defendants never served the order on Arar's lawyer, as required by 8 C.F.R. § 292.5(a) (2002), and never informed her that Arar had been removed to Syria. App. G, 462a.

Upon delivering Arar to Syria, defendants provided Syrian security officials with a dossier on Arar and

questions to ask him. App. G, 460a. Syrian officials tortured Arar while asking him questions strikingly similar to those federal agents had asked him in New York, and detained him without charge for nearly a year, most of that time in a dark damp underground cell the size of a grave, three feet by six feet by seven feet. App. G, 459a-461a. Defendants obtained from the Syrians the answers they extracted from Arar by torture. App. G, 460a.

After a year, Syrian officials released Arar, finding no connection to terrorism or evidence of wrongdoing. App. G, 463a. He returned to Canada, which convened a commission to conduct a public investigation into Canadian officials' conduct related to Arar's case. The Commission Report fully exonerated Arar, and found that Canadian officials provided false information about him to U.S. officials, but that the Canadians were not complicit in the U.S. officials' delivery of Arar to Syria.[3] The Canadian Parliament unanimously apologized to Arar, as did the Prime Minister, and the Canadian government paid him 10.5 million dollars (Canadian) for its part in his ordeal. App. A, 73a.

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[3] *See* COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR (2006), *available at* http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm (last visited Jan. 31, 2010); *see also*, Addendum to the Report (Aug. 9, 2007), which released previously redacted portions of the Report, and is available on the same site. The court of appeals took judicial notice of the existence of the three-volume Report and its Addendum, as well as the scope of their contents, but not the facts asserted therein. App. A, 71a-72a.

3. Shortly after his release, Arar filed this lawsuit against the U.S. federal officials responsible for sending him to Syria. Arar alleged that the federal officials sent him to Syria because, unlike Canada, Syria had a known practice of torturing its detainees, and further alleged that defendants conspired with the Syrians to subject Arar to torture. App. G, 460a-461a; *see also* App. G, Ex. A, 477a-480a. He also alleged that defendants conspired to keep him away from a court while he was detained to ensure that their illegal plan could not be frustrated. App. G, 441, 452a-458a. Most of Arar's allegations have since been confirmed by the Canadian Commission of Inquiry, and by the Department of Homeland Security's Inspector General.[4]

Had Arar not been illegally precluded from seeking judicial relief while in U.S. custody, a federal court could—and almost certainly would—have barred his removal, because there were substantial grounds to believe he would be tortured if delivered to Syria security officials. 8 U.S.C. § 1231 note; 8 U.S.C. §1252(a). Having been denied that opportunity by defendants, Arar sued for the only relief still available to him: (1) damages for violation of his rights under the Fifth Amendment and the TVPA; and (2) declaratory and injunctive relief invalidating his illegal removal order and lifting the bar on his reentry to the United States.

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[4] *See* DEP'T. OF HOMELAND SECURITY'S OFFICE OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA, OIC-08-18 (March 2008, publicly released June 5, 2008), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIGr_08-18_Jun08.pdf (last visited Jan. 31, 2010) ("OIG Report"). The court of appeals took judicial notice of the existence of the unclassified OIG report and the scope of its contents.

In 2006, the district court dismissed Arar's *Bivens* claim for torture on the ground that "special factors" relating to national security and foreign policy foreclosed any such relief. App. C, 408a-414a. It also dismissed Arar's TVPA claim, holding that, in delivering Arar to Syrian officials and conspiring to have him tortured there, the federal defendants were acting under color of federal law and therefore could not be acting under color of foreign law. App. C, 367a-372a.

The court also dismissed Arar's claim that he had been denied access to court for failure to plead sufficient facts. App. C, 415a-421a. It permitted Arar to replead, but required that he do so *without reference to his removal to Syria*—even though it was precisely his right to seek judicial protection from that removal that Arar alleged defendants had obstructed.

4. In 2008, the court of appeals affirmed, initially by a 2-1 panel opinion. App. B, 195a-334a. Shortly thereafter, the court *sua sponte* granted *en banc* review. On November 2, 2009, the *en banc* court also affirmed, by a vote of 7-4. App. A, 1a-194a. The majority ruled that federal courts deciding whether to recognize a *Bivens* action should consider only factors *against* recognizing such a claim, and that even the slightest cause for hesitation requires dismissal. App. A, 31a-32a. Applying that one-sided test, the majority concluded that because Arar had sued high-level federal officials, because his suit might require the consideration of confidential information, and because his claims implicated foreign affairs and national security, it should be dismissed at the threshold. App. A, 33a-42a.

The majority held that Arar's TVPA claim failed because his allegations that the federal defendants had conspired with the Syrians to subject him to torture in Syria, delivered him there, and provided questions for and obtained answers from his torture, were insufficient to establish that they had acted under "color of law" of a foreign nation, as required by the TVPA. The court reasoned that unless the federal defendants were alleged to have directly exercised Syrian authority themselves, they could not be held liable. App. A, 18a.

The majority also held that Arar's claim for denial of access to court was insufficiently pleaded because he was unable to identify precisely which officials had blocked him from seeing an attorney and being able to seek judicial review. App. A, 21a.[5]

Four judges dissented in four separate opinions, with each dissenting judge joining the other dissents in full. Finding that this case did not present a "new context," Judge Sack maintained that the majority had artificially and improperly divided Arar's claim for relief, which alleged a continuing constitutional violation consisting of apprehension, detention, interrogation, denial of access to the courts, and delivering him to Syria to be tortured and arbitrarily detained. App. A,

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[5] The *en banc* majority also egregiously misstated critical facts. It stated that Canada was unwilling to accept Arar's return, App. A, 48a, when the record established precisely the opposite—Canada had told U.S. authorities that it would admit Arar—as expressly addressed at oral argument, and again in a post-decision letter notifying the court of appeals of its error. Letter from David Cole, counsel for Maher Arar, to Catherine O'Hagan Wolfe, Clerk of the Court (Nov. 24, 2009) (on file with the Second Circuit). Yet the court never corrected its erroneous statement, which it offered as a way of "explaining" the government's actions.

89a. He reasoned that had defendants tortured Arar themselves in New York, a *Bivens* action would plainly lie, and that the fact that defendants chose to "outsource" the torture elsewhere should not warrant a different result. App. A, 96a-97a; 106a-107a.

As noted above, Judge Parker argued that *Bivens* relief was especially appropriate because federal officials affirmatively blocked Arar's access to a congressionally-mandated judicial remedy, deliberately circumventing the checks and balances Congress established. App. A, 128a. He found that to deny a remedy in this case "would immunize official misconduct." App. A, 126a.

Judge Pooler reasoned that under Section 1983 jurisprudence, which Congress instructed the courts to follow in construing the TVPA, willful participation in joint action with a foreign government official's illegal actions is sufficient to constitute action under color of law. App. A, 171a. She specifically noted that the majority's conclusion to the contrary conflicts with this Court's Section 1983 jurisprudence and the Eleventh Circuit's decision construing the TVPA in *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1249, 1255 (11th Cir. 2005). App. A, 171a.

Judge Calabresi warned that "when the history of this distinguished court is written, today's majority decision will be viewed with dismay." App. A, 173a. He argued that the majority's concerns about treatment of confidential information should be addressed through invocation and assessment of the state secrets privilege, and not by closing the door on Arar's claims

based on speculation about potential secrecy issues. App. A, 185a.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Decision Raises Issues of National Importance by Precluding a *Bivens* Remedy Where Federal Defendants Obstructed Petitioner's Access to the Specific Remedy Provided by Congress.

The court of appeals concluded that Arar's claim that federal defendants violated his constitutional rights by sending him to Syria to be tortured could not support a *Bivens* claim because it would raise issues regarding national security, foreign policy, and confidential information. But the court failed to acknowledge that all of the same issues would have been present had defendants not obstructed Arar from seeking court review of his removal order while in the United States, as Congress contemplated. Implementing a treaty signed by the President and ratified by the Senate, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Congress has directed that no alien should be removed to a country where he or she faces a substantial risk of torture, and has provided for judicial review of removal decisions to ensure enforcement of that guarantee. App. E, 431a-433a, 8 U.S.C. § 1231 (a) and (e) (prohibiting sending any person to a country where he faces danger of torture); 8 U.S.C. §§ 1252(a)(2)(D), (a)(4) (granting court of appeals jurisdiction to review constitutional and CAT claims in petitions for review of removal orders). Courts routinely review removal decisions involving claims that aliens

would face a risk of torture if removed, even where foreign policy or national security issues are present.[6] Arar's claim for damages raises no issues of foreign policy, national security, or classified information that would not have been present had he been able to invoke the judicial review Congress provided.

The court of appeals' decision therefore has the sweeping consequence of disabling the *Bivens* remedy as a deterrent against federal officials who circumvent the finely wrought checks and balances that Congress

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[6] *See, e.g., Khouzam v. Attorney General of the United States*, 549 F.3d 235 (3d Cir. 2008) (neither foreign relations concerns nor the non-inquiry doctrine precluded the court from reviewing a removal order under CAT); *Pierre v. Gonzales*, 502 F.3d 109, 116 (2d Cir. 2007) (reviewing CAT claim on petition for review of removal order); *Gourdet v. Holder*, 587 F.3d 1, 5-7 (1st Cir. 2009) (same); *Amir v. Gonzales*, 467 F.3d 921, 926-27 (6th Cir. 2006) (same); *Zheng v. Ashcroft*, 332 F.3d 1186, 1188-89, 1194-96 (9th Cir. 2003) (same); *cf. Mironescu v. Costner*, 480 F.3d 664, 672-73 (4th Cir. 2007) (neither foreign policy implications nor confidential communications with other nations bar judicial consideration of a habeas action questioning whether extradition to another country would violate CAT).

In addition, aliens held for removal proceedings may invoke federal court review via habeas corpus in appropriate circumstances, *see Cadet v. Bulger*, 377 F.3d 1173, 1181-83 (11th Cir. 2004) (habeas jurisdiction includes review of CAT claims in appropriate circumstances); *Singh v. Ashcroft*, 351 F.3d 435, 441 (9th Cir. 2003) (same); *Wang v. Ashcroft*, 320 F.3d 130, 140-42 (2d Cir. 2003) (same); *Saint Fort v. Ashcroft*, 329 F.3d 191, 200-02 (1st Cir. 2003). That avenue would also have been available to Arar had defendants allowed him access to court. *See INS v. St. Cyr*, 533 U.S. 289 (2001); *see also* App. A, 83a (quoting U.S. government at *en banc* oral argument stating Second Circuit precedent "'shows that in extraordinary cases, and no one can dispute that this is an extraordinary case, the plaintiff could have filed a habeas [petition] and sought a stay pursuant to the All Writs Act.'").

established to protect against sending aliens to countries where they face a risk of torture. It effectively permits executive officials to unilaterally preclude congressionally guaranteed judicial review by ensuring that an alien in their custody cannot get access to a lawyer or court. Congress plainly considered some judicial review appropriate. By denying all judicial review in a situation where defendants blocked the review Congress provided, the court of appeals undermined the clear intent of Congress and effectively allowed the Executive to manipulate the jurisdiction of the courts.

As this Court has stated, one of the predominant justifications for *Bivens* remedies is to deter unconstitutional conduct. *Carlson v. Green*, 446 U.S. 14, 21 (1980) ("the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose"); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations"). Here, the availability of a *Bivens* remedy would play a crucial deterrent role in assuring that the system created by Congress to protect aliens from subjection to torture—including its provision of judicial review—cannot be circumvented. The court of appeals' decision permits executive officials to escape all accountability so long as they ensure that aliens in their custody cannot get to court.

Moreover, defendants are not merely alleged to have sent Arar to Syria *despite* the risk of torture. They are alleged to have sent him to Syria *for the purpose of* having him tortured—in the hopes of extracting

information from him.[7] To immunize federal defendants from any judicial review under these circumstances is to countenance not only a subversion of our system of checks and balances, but torture itself, and on these grounds alone warrants this Court's review—even apart from the conflicts discussed below that the Second Circuit's decision created with decisions of this Court and other courts of appeals.

This Court has made clear that Congress and the courts have important roles to play in ensuring that our commitment to the rule of law is not overborne by concerns of national security. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In this instance, Congress has expressly directed the courts to protect the fundamental human rights guarantee against torture, yet executive officials intentionally subverted both that guarantee and the

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[7] DHS Inspector General Skinner testified that he could not rule out the possibility that Arar was sent to Syria because federal officials wanted him interrogated "under conditions that our law would not permit." *U.S. Department of Homeland Security Inspector General Report OIG-08-18, 'The Removal of a Canadian Citizen to Syria,' Joint Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the Comm. on the Judiciary and the Subcomm. on Int'l Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs of the House of Representatives*, 110th Congress 53 (2008) (oral testimony of Richard L. Skinner, Office of the Inspector General, U.S. Dept. of Homeland Security, *available at* http://judiciary.house.gov/hearings/printers/110th/42724.PDF "Testimony of IG Skinner"). Although the "INS concluded that Arar was entitled to protection from torture and that returning him to Syria would more likely than not result in his torture", (OIG Report, at 22), that decision was "ultimately overridden." Testimony of IG Skinner at 56.

judicial review process Congress established. In these circumstances, a *Bivens* action is not only appropriate, but necessary, to reaffirm the checks and balances that Congress sought to ensure.

II. The Court of Appeals' Decision Adopted an Unprecedented and Virtually Irrebuttable Presumption against *Bivens* Actions, in Conflict with Decisions of This Court and the Courts of Appeals.

The court of appeals' decision departs radically from the *Bivens* jurisprudence of this Court and the lower federal courts, imposing an unprecedented and virtually insurmountable presumption against *Bivens* actions, in direct contravention of this Court's most recent *Bivens* decision, *Wilkie v. Robbins*, 551 U.S. 537 (2007), and decisions of several courts of appeals. This Court in *Wilkie* held that the decision whether to recognize a *Bivens* action is an exercise of federal common law requiring careful weighing of factors for and against a damages remedy in the particular circumstances. The court of appeals, however, ruled that it must close its eyes to any factors *in favor of* recognizing an action, and could consider only factors that counseled *against* recognizing such an action. It further held that *any* reason for hesitation should conclusively bar the door to such claims. That artificially one-sided, hair-trigger approach has never been adopted by any other court, and is directly contrary to *Wilkie*'s directive that courts weigh all considerations both for and against recognition of a *Bivens* remedy.

There is no dispute that torture "shocks the conscience" and violates the Fifth Amendment. *Rochin v.*

California, 342 U.S. 165 (1952). *Bivens* actions for physical abuse of prisoners in U.S. custody are also well-established. *Carlson v. Green*, 446 U.S. 14. Thus, as Judge Sack noted, there could be no question that a *Bivens* action would lie had defendants tortured Arar themselves while he was detained in New York. App. 91a-97a. Indeed, the United States itself has affirmatively represented that a *Bivens* action is available to hold federal officials accountable for torture.[8] That defendants decided to torture Arar by sending him elsewhere does not change that fundamental principle.

1. The Court's Interpretation of the "Special Factors" Inquiry Conflicts with Decisions of This Court and the Courts of Appeals.

By holding that it could not even *consider* any factors favoring a *Bivens* remedy, and creating a hair-trigger test barring *Bivens* relief if there is any reason to hesitate whatsoever, the court of appeals' decision contravenes this Court's jurisprudence and conflicts with decision of other courts of appeals.

This Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), held that where federal officials violate an individual's constitutional rights, federal courts may grant relief in the form of damages as a deterrent to unconstitutional behavior and as a remedy for constitutional injury. As Justice Harlan explained, just as federal courts may grant injunctive relief where federal officials violate an individual's constitutional rights—

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[8] *See* note 1, *supra*.

despite the absence of an express provision in the Constitution for such a remedy—so the Court may, in appropriate cases, grant monetary relief. *Id.* at 404-05 (Harlan, J., concurring). The Court noted, however, that where Congress has expressly established an adequate alternative remedial scheme, or when "special factors counseling hesitation" are present, the Court should stay its hand and decline to recognize an action for damages. *Id.* at 396.

Since *Bivens*, this Court has held that damages relief can be afforded against members of Congress for employment discrimination—even where Congress chose *not* to make its own members liable—and against prison officials for abusive treatment of prisoners—despite the Court's traditional deference to concerns of prison security and administration. *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14. Lower courts have also held that *Bivens* actions lie to remedy abusive treatment of detainees held in custody by U.S. officials.[9]

The court here reached a contrary result by transforming the "special factors counseling hesitation" inquiry into a near-insurmountable presumption against *Bivens* relief. It took what this Court established as a ("special") *exception* to relief, and turned it into the ordinary rule, from which cases recognizing *Bivens* relief would become the exceedingly rare exception. It achieved this result in two ways, both unprecedented.

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[9] *See, e.g., Martinez-Aguerro v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006); *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988); *Bagola v. Kindt*, 131 F.3d 632 (7th Cir. 1997); *Magluta v. Samples*, 375 F.3d 1269 (11th Cir. 2004).

First, the court of appeals held that in determining whether to recognize a *Bivens* cause of action, the court should consider only factors counseling *against* recognizing a *Bivens* action, and insisted that "no account is taken of countervailing factors that might counsel" in *favor* of a *Bivens* remedy. App. A, 32a.. This artificially skewed approach is directly contrary to this Court's directive in *Wilkie v. Robbins*, 551 U.S. at 554, that courts must "weigh[] reasons *for and against* the creation of a new cause of action, the way common law judges have always done." (emphasis added); *id.* (courts must consider the "competing arguments" for and against recognizing a *Bivens* action).

The *en banc* majority's approach also conflicts with that of other circuits, which have similarly recognized that courts must weigh factors *for* as well as *against* such relief. *See Bagola v. Kindt*, 131 F.3d 632, 643 (7th Cir. 1997) (recognizing *Bivens* action for prison abuse, in light of "the deterrence factor identified in *Carlson*, as well as the recognized necessity to provide *some* forum for a prisoner's constitutional claims"); *see also Smith v. United States*, 561 F.3d 1090, 1103 (10th Cir. 2009) (same). Similarly, the D.C. Circuit has explicitly recognized that consideration of factors for and against *Bivens* relief is mandated. *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) ("[t]he decision of whether to create a *Bivens* remedy involves our judgment and 'weighing [of] reasons for and against the creation of a new cause of action, the way common law judges have always done.'") (quoting *Wilkie v. Robbins*, 551 U.S. at 554) (alterations in original).

Considering only factors counseling against *Bivens* relief, and artificially closing one's eyes to any fac-

tors in favor of such relief, is contrary to the very premise of *Bivens* itself. As this Court reiterated in *Wilkie*, the decision whether to grant damages for federal officials' constitutional violations is an exercise of federal common law, a function whose very nature requires courts to weigh all relevant considerations in reaching its result. 551 U.S. at 554. The *en banc* majority identified no reason why a court would artificially refuse even to *consider* one side of an issue in shaping a common law remedy.

Because of its artificially one-sided approach, the court of appeals failed to consider several features strongly supporting damages relief. It did not consider the fact that the United States is legally obligated not to engage in torture, not to send a person to a country where it is more likely than not that he will be tortured, and to provide remedies for torture. CAT, Arts. 2, 3 and 14. It did not consider that the State Department has officially represented that the United States meets its obligation to provide remedies for torture by federal officials through *Bivens* actions.[10] And it failed to consider perhaps the most important factor favoring a *Bivens* action here, namely that Congress gave the courts a role to play in protecting against precisely such conduct, but defendants affirmatively obstructed Arar's access to that very mechanism. Several courts have recognized the important deterrent function that *Bivens* can play where, as here, federal officials have obstructed an individual's access to an alternative remedy. *Sonntag v. Dooley*, 650 F.2d 904 (7th Cir. 1981); *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980); *see also*

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[10] *See* note 1, *supra*.

Munsell v. Dep't of Agriculture, 509 F.3d 572 (D.C. Cir. 2007).

Second, and equally without precedent, the court characterized the "special factors" threshold as "remarkably low," and maintained that "whenever thoughtful discretion would pause even to consider" whether to grant a *Bivens* remedy, the courts should dismiss the claim at the threshold. App. A, 32a.. This trip-wire test creates a nearly irrebuttable presumption against relief for all constitutional violations, as there is inherent in the common law function "discretion" to "pause to consider." *Bivens, Carlson v. Green,* and *Davis v. Passman* all generated substantial dissents, so that if the test were as low as the court of appeals articulated it, those cases would not have warranted relief. *No court of appeals* has interpreted the "special factors" test to impose such an overwhelming burden.

The combination of the court of appeals' two guiding principles—taking no account of reasons *for* a *Bivens* action while giving preclusive effect to even the slightest concern *against* a *Bivens* action—virtually ensures that a *Bivens* remedy will never be recognized. As Judge Sack noted, the majority approach renders *Bivens* relief entirely "chimerical." App. A, 102a. That approach is in sharp conflict with *Bivens* jurisprudence, and warrants this Court's review.

2. The Court of Appeals Erred in Its Application of the "Special Factors" Inquiry.

The court of appeals also erred in its application of the "special factors" inquiry to the circumstances presented by petitioner's case. As a preliminary matter, it erred in treating the "context" of this action as "new." Arar sues individual federal officials for their intentional complicity in his torture. As Judge Sack correctly noted, there is nothing new about suing individual federal officials, nor about claims for abuse of persons in custody. App. A, 89a-97a. The *en banc* majority, however, erroneously treated the suit as "new" because it mischaracterized it as a broad challenge to the policy of "extraordinary rendition," App. A. 27a-28a, 35a, a policy it described as generally *not* involving intentionally subjecting an individual to torture. App. A, 8a-9a; *cf.* App. A, 28a.

While Arar's complaint cited the government's rendition policy, it plainly did so as an evidentiary fact that supported the plausibility of his allegations. App. G, 440a-441a. His *legal claim for relief* sought no remedy with respect to that policy, but merely sought remedies for a specific incident in which he was detained, denied access to court and counsel, and delivered to Syria to be tortured. The complaint requests no injunction against extraordinary rendition, nor does it require the Court to assess the validity of any other extraordinary rendition or of any general policy of rendition. Plaintiff's claim alleges only that a person detained on American soil cannot be subjected to torture. That claim is not "new."

The court's failure to treat Arar's complaint as a challenge to torture led it to surmise that the case would require inquiry into a set of questions it felt ill-equipped to answer, including:

> the perceived need for the [extraordinary rendition] policy, the threats to which it responds, the substance and sources of the intelligence used to formulate it, and the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries.

App. A, 35a. But had the court treated the case as a challenge to the intentional infliction of torture, none of these questions would arise, as there are no "geopolitical circumstances" or "perceived need[s]" that could justify torture, and the government has never suggested otherwise.

It is true that the federal officials did not physically torture Arar themselves while he was in their custody on American soil. Instead, they sent him to Syria for the purpose of having him tortured there. But as Judge Sack noted, the method by which the government effectuates torture does not make a claim for torture "new." App. A, 91a-92a. Torture is forbidden under our Constitution in any circumstance.

Second, the court impermissibly treated as a "special factor" the fact that Arar's claim was brought "against senior officials" for implementing a federal "policy." App. A, 34a. To permit a damages remedy, where "in critical respects" the lawsuit is really

"against the [U.S.] government as to which the government has not waived sovereign immunity," the court reasoned, "unavoidably influences government policy," involves "an assessment of the validity and rationale of that policy and its implementation in this particular case," enmeshes government lawyers, and elicits government funds for settlement. App. A, 34-35a.

The court of appeals' reasoning conflicts with *Mitchell v. Forsyth*, 472 U.S. 511 (1985), in which this Court denied a plea by the Attorney General for absolute immunity from a *Biven's* action based on his authorization of a warrantless national security wiretap. The Court ruled that qualified immunity is sufficient to protect the ability of high level officials to implement policy. Similarly, in *Carlson*, this Court rejected an argument that special factors counseled hesitation in a suit against, among others, the Director of the Federal Bureau of Prisons, stating:

> The case involves no special factors counselling hesitation in the absence of affirmative action by Congress. Petitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. Moreover, even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz* v. *Economou*, 438 U.S. 478 (1978), provides adequate protection.

Carlson, 446 U.S. at 19 (citations omitted).

The courts of appeals have also allowed *Bivens* remedies against senior government officials implementing official policy. *See, e.g.*, *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) (declining to dismiss *Bivens* action against former Attorney General for pretextual detention of suspected terrorists under material witness statute); *Magluta v. Samples*, 375 F.3d 1269 (11th Cir. 2004) (reversing dismissal of *Bivens* action against regional director of the Bureau of Prisons for punitive placement of prisoner in administrative segregation); *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001) *cert. denied*, 537 U.S. 1045 (2002) (reversing dismissal of *Bivens* action against Director of the F.B.I. for involvement in allegedly retaliatory search).

Where senior executive officials violate the Constitution, qualified immunity suffices to avoid improper interference with the performance of their duties. The court's treatment of this concern as a special factor compelling dismissal effectively grants federal officials the absolute immunity this Court rejected.

Third, the court reasoned that adjudicating the case would require inappropriate assessments of foreign policy and national security concerns. App. A, 33a-38a. But as noted in Point I, *supra*, Congress has expressly authorized courts to adjudicate claims that the executive is planning to send an alien to a country where he faces a risk of torture—even though such claims inevitably implicate foreign government conduct and may result in judicial determinations affecting foreign relations with which the Executive strongly disagrees. Where, as here, both Congress and the Ex-

ecutive have unequivocally condemned torture under *all* circumstances, and provided for a judicial remedy to prevent sending someone to torture, granting relief for torture would *enforce* federal foreign policy, not conflict with it. The court of appeals' contrary conclusion appears to be based on the misconception that Arar was challenging, not his subjection to torture, but a general policy of rendition that may or may not (at least in the court's view) involve the intentional infliction of torture.

Fourth, the court relied on the fact that classified information may be implicated by the suit as a reason to reject it at the threshold. App. A, 38a-39a. But as Judges Calabresi and Sack persuasively argued, given the existence of other, more finely calibrated tools to address such concerns, barring adjudication at the threshold on the basis of speculation about classified information is inappropriate. App. A, 189a-194a; App. A, 111a-120a. The court reasoned that the case may require assessment of classified information, might require some parts of the proceeding to be closed, and might cause the United States to be "graymailed" into settling to avoid disclosure of secrets that the individual defendants have no incentive to protect. App. A, 38a-46a. But courts routinely address issues of classified information; the partial closure of civil proceedings has been upheld where warranted; and the government may assert a "state secrets" privilege to protect any legitimate secrets, and therefore faces no risk of "graymail." When such tools are readily available, speculation about confidentiality concerns cannot serve to preclude *Bivens* relief at the threshold—before

the courts have even attempted to address these concerns through less draconian measures.[11]

III. The Court of Appeals' Holding that Defendants Did Not Act Under "Color of Law" of a Foreign Nation When They Conspired With Syrian Officials Conflicts With Decisions of This Court and the Eleventh Circuit.

The court of appeals also rejected petitioner's statutory claim for relief under the TVPA, which provides a cause of action for damages for individuals subjected to torture under color of law of a foreign nation. App. A, 17a-19a. The court did not dispute established precedent that the "color of law" standard is to be construed in accordance with the "color of law" requirement in 42 U.S.C. § 1983, App. A, 17a, or that liability extends not merely to those who actually carry out torture, but also to those who are complicit in torture. App. A, 18a. Yet the majority concluded that TVPA liability did not attach because the federal defendants

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[11] The majority also found that investigating "assurances" would "potentially embarrass our government through inadvertent or deliberate disclosure of information harmful to our own and other states." App. A, 43a. These concerns are no different than others regarding classified information, and for the same reasons should not preclude a remedy at the outset. Moreover, the purported "assurances" from Syria—a country whose security services the U.S. Department of State has repeatedly determined tortures detainees during interrogation, App. G, 453a-454a, App. G., Ex. A, 480a-481a—were found to be ambiguous by the DHS OIG, which also found that the validity of the assurances was apparently not examined. OIG Report, at 5, 22. Moreover, in light of these unusual irregularities, the OIG Report explicitly declined to call what was received "diplomatic" assurances. OIG Report, at 34; App. A, 42a.

did not themselves directly "exercise[] power or authority under Syrian law." App. A, 18a-19a. This conclusion conflicts with decisions of this Court and other courts of appeals establishing that "willful participation in joint action" is sufficient to establish action under "color of law."

The federal defendants allegedly took extensive affirmative acts to ensure that Arar would be tortured under color of Syrian law. They delivered him to Syria for the purpose of having him tortured by Syrian officials, gave the Syrians a dossier on Arar and questions to ask him while he was being tortured, and obtained from the Syrians the answers extracted from Arar through torture. On these allegations, defendants willfully participated in joint action with Syrian officials, which satisfies the requirement that they subjected Arar to torture under color of Syrian law.

The majority decision requiring not "willful participation in joint action," but direct exercise of Syrian authority, conflicts with this Court's decision in *Dennis v. Sparks*, 449 U.S. 24 (1980). In *Sparks*, the Court found that private parties who bribed a judge to issue an injunction acted under color of state law. *Id.* at 27-28. The private parties did not themselves exercise state power or authority; rather, they sought to influence the judge to use his state authority to their benefit. The Court deemed it sufficient that they were "willful participant[s] in joint action." *Id.* at 27. *See also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (action "under color of law" may be found "when a private actor operates as a

'willful participant in joint activity with the State or its agents'") (internal citations omitted).[12]

The court of appeals' holding also conflicts with the Eleventh Circuit's decision in *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 1249, 1265 (11th Cir. 2005), which held that allegations that a U.S. corporation "direct[ed] its . . . agents," including a Guatemalan mayor, "to torture the Plaintiffs" were sufficient to state a claim under the TVPA. There was no allegation that the corporation "exercised power or authority under [Guatemalan] law," as the *Arar* majority would have required. The Eleventh Circuit deemed it sufficient that the corporation allegedly participated in joint action with a foreign official.

The majority suggested that the "color of law" rule is different when defendants are federal officials rather than private parties. App. A, 19a, n.3. But "[i]t is a well-established principle. . . that federal officials are subject to section 1983 liability . . . where they have acted under color of state law, for example in conspiracy with state officials." *Hindes v. FDIC*, 137 F. 3d 148, 158 (3d Cir. 1998) (citing Third, Fifth, Sixth, Eighth, and Ninth Circuit cases). None of the decisions cited in *Hindes* required the federal official to have directly exercised power or authority under state law.

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[12] *See also Wagenmann v. Adams*, 829 F.2d 196, 211 (1st Cir. 1987) (private actor who "exerted influence" on the police by conspiring with them to have plaintiff arrested acted under color of law); *Crowe v. County of San Diego*, __ F.3d __, 2010 U.S. App. LEXIS 894,*67-*68 (9th Cir. Jan. 14, 2010) (finding private psychologist can be liable for a conspiracy under section 1983 where he helped police "formulate a 'tactical plan' to approach the interview," which detectives "'pretty much' followed," and insofar as the tactics and questioning shock the conscience).

They focused instead on whether joint action between federal and state officials existed. In *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd on other grounds*, 446 U.S. 754 (1980), for example, the court found that federal officials acted under color of state law when they initiated an investigation and shared information with state officials to help effectuate federal counterintelligence goals, even though there was no allegation that the federal officials were directly exercising state power or authority.[13]

The majority objected that finding federal officials liable would "render a U.S. official an official of a foreign government when she deals with that foreign state on matters involving intelligence, military, and diplomatic affairs." App. A, 19a, n.3. But holding federal officials liable under Section 1983 or the TVPA does not "render" them state officials or foreign officials, any more than holding private parties liable under Section 1983 or the TVPA makes them government employees. It simply means that where, as here, a federal official is a willful participant in joint action with an official of a foreign government to effectuate torture under foreign law, he is also liable for the wrong.

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[13] The majority opinion also conflicts with well-established agency principles applicable to the conspiracy alleged here. "[C]onspirators are partners in crime . . . As such, the law deems them agents of one another." *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974) (citations omitted). Because federal defendants conspired with Syria to torture Arar, the law deems them agents of Syria for that purpose, and therefore to be exercising authority under Syrian law.

IV. The Dismissal of Petitioners' Access to Court Claim for Failure to Identify the Particular Defendants Responsible for Blocking his Access to Court Conflicts with Decisions of This Court and Other Courts of Appeals.

The court of appeals upheld the dismissal of Arar's *Bivens* claims for denial of access to court on the ground that his complaint failed to identify which defendants were personally involved in the actions undertaken to keep him out of court. App. A, 21a. As Judge Parker persuasively demonstrates in dissent, however, this conclusion cannot be squared with the liberal notice pleading requirements of Rule 8, and conflicts with this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). App. A, 138a-146a. As Judge Parker reasoned:

> The majority faults Arar for not pinpointing the individuals responsible for each event set out in the complaint and for failure to particularize more fully when and with whom they conspired. The irony involved in imposing on a plaintiff — who was held in solitary confinement and then imprisoned for ten months in an underground cell — a standard so self-evidently impossible to meet, appears to have been lost on the majority.

App. A, 145a-146a.

Arar did not simply allege in conclusory fashion

that he was denied access to court. Instead, he pointed to a series of specific actions undertaken by his captors which support the conclusion that defendants deliberately blocked him from seeking judicial review of his removal to Syria — denying him the right to make any phone call for the first five days of detention; repeatedly denying his requests for an attorney; hastily scheduling his "credible fear of torture" proceeding late on a Sunday night; "notifying" the attorney of the Sunday night proceeding only by leaving a message on her office voicemail that evening; lying to Arar that his attorney had chosen not to participate in the proceeding; lying to Arar's lawyer about his whereabouts when she called the next day; swiftly and covertly removing Arar under cover of darkness early the next morning; serving Arar with his "Final Notice of Inadmissibility," the prerequisite to a petition for review, as they were taking him to the plane that would deliver him to Syria; and never serving that notice on Arar's attorney or informing her that he was removed to Syria App. G, 452a-458a, 462a.

The court of appeals' conclusion that these allegations do not state a claim because Arar could not identify precisely which defendants committed each of these acts is factually and legally erroneous. Arar alleged that defendant McElroy personally left the message on the voicemail at Arar's attorney's office at a time when he knew it to be closed (Sunday evening). App. G, 456a. Most importantly, as Judge Sack underscored, the denial of access to court is alleged to be but one piece of the defendants' broader conspiracy to send Arar to Syria to be tortured, and Arar specifically alleges the defendants' personal role in that broader conspiracy. App. A, 74a,86a-88a. The removal required

the approval of defendants Blackman, who signed the "Final Notice of Inadmissibility;" Ziglar, who determined that the removal was consistent with the Convention Against Torture; and Thompson, who personally rejected Arar's designation of Canada as the country he wanted to go to, thereby paving the way for him to be sent to Syria. App. G, 446a, 458a; App. G, Ex. D, 581a-590a.[14] And as Judge Parker notes, it is highly implausible that defendants Ashcroft and Mueller were *not* involved in the extraordinary decision to send a Canadian man suspected of terrorist ties to Syria. App. A, 144a ("The inference that, in 2002, high-level officials had a role in the detention of a suspected member of al Qaeda requires little imagination.").

It is inconceivable that these defendants were specifically involved in the conspiracy to send Arar to Syria to be tortured, but were *not* involved in the inextricably interrelated conspiracy to deny him access to court in order to carry out their unlawful plan. Indeed, the *en banc* majority had "no trouble" affirming personal jurisdiction over Ashcroft, Thompson and Mueller (App. A, 6a-7a), which required finding sufficient allegations of each defendants' personal involvement

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[14] The DHS OIG Report, issued years after Arar's complaint was filed, and based on an official internal investigation, demonstrates that further evidence regarding defendants' personal involvement was in defendants' control, and might have been disclosed through discovery. For example, Blackman directed Arar to be asked if he would agree to go to Syria. OIG Report, 11, 20. Ziglar was one of the "principal decision-makers involved in the Arar case." OIG Report at 38. Ziglar attended meetings about Arar on at least three of the days Arar was in New York, including the day he arrived, OIG Report at 11, 20, and authorized Arar's removal to Syria on October 7th. OIG Report at 30.

in Arar's mistreatment (App. B, 227a-232a; *see also* App. A, 143a; yet they simultaneously found Arar could not meet a notice pleading standard that defendants were involved in decisions to preclude him from going to court. To find implausible Arar's allegations that these defendants were involved in both his subjection to torture and denial of access to court, one would have to posit two separate conspiracies—one to send Arar to Syria and another to deny him access to courts—perpetrated by two entirely different sets of defendants.

Moreover, it is certainly a reasonable expectation that discovery would reveal evidence supporting defendants' personal involvement in the denial of Arar's access to court, given the complaint's allegations that the defendants were involved in his unlawful removal to Syria. *See Twombly*, 550 U.S. at 556 (requiring simply "enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claims). Unlike *Iqbal*, where an "obvious alternative explanation" for the facts asserted rendered the plaintiff's conclusory allegation that Ashcroft had conspired to detain individuals on the basis of race and ethnicity, 129 S. Ct. at 1951-52, here there is simply no plausible alternative explanation for denying Arar contact with a lawyer, hastily holding a proceeding late on a Sunday night the day after Arar first met with his lawyer, lying to the lawyer the next day, and then serving Arar (not his lawyer) with his notice of inadmissibility only as he is being taken, shackled, to the plane that would bring him to Syria. Indeed, defendants never even *attempted* to advance an alternative explanation. The only plausible explanation for the facts asserted in Arar's complaint is that, having conspired to send a

man to Syria because that government used torture as an interrogation method, defendants also had to deny Arar access to the judicial review that would have exposed and frustrated their plan.

Accordingly, the majority erred in upholding the dismissal of Arar's denial of access to court claim, applying an impossible-to-satisfy pleading requirement in conflict with this Court's decisions in *Twombly* and *Iqbal*. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) (holding that district court violated fundamental tenet that inferences are to be drawn in favor of the non-moving party on motions to dismiss, and distinguishing *Iqbal* because in that case there was an "obvious alternative explanation" for the defendants' conduct, requiring Iqbal to plead facts that would rule out this alternative); *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (noting importance of liberal notice pleading).

CONCLUSION

For all of the above reasons, the Court should grant the petition for a writ of certiorari.

Dated: February 1, 2010

Respectfully submitted,

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APPENDIX A – ENTERED November 2, 2009.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civil Action No. 06-4216-cv

585 F.3d 559

Decided: November 2, 2009,
As Amended November 5, 2009.
As Amended December 23, 2009.

MAHER ARAR,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, Attorney General of the United States, LARRY D. THOMPSON, formerly Acting Deputy Attorney General, TOM RIDGE, Secretary of Homeland Security, J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement, EDWARD J. MCELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now Customs Enforcement, ROBERT

MUELLER, Director of the Federal Bureau of Investigation, John Doe 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, and JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, United States,

Defendants-Appellees.

Arar's complaint alleges violations of the Torture Victim Protection Act ("TVPA") and the Fifth Amendment. The District Court dismissed the complaint. Id. at 287-88. A three-judge panel of this Court unanimously held that: (1) the District Court had personal jurisdiction over Thompson, Ashcroft, and Mueller; (2) Arar failed to state a claim under the TVPA; and (3) Arar failed to establish subject matter jurisdiction over his request for a declaratory judgment. Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008).

DAVID COLE (Maria Couri LaHood, Jules Lobel, Katherine Gallagher, on the brief), Center for Constitutional Rights, New York, NY; Joshua S. Sohn (on the brief), DLA Piper US LLP, New York, NY, for Plaintiff-Appellant.

JONATHAN F. COHN, Deputy Assistant Attorney General (Gregory G. Katsas, Assistant Attorney General; Benton J. Campbell, United

States Attorney; Larry Lee Gregg, R. Joseph Sher, Dennis C. Barghaan, Assistant United States Attorneys; Mary Hampton Mason, Jeremy S. Brumbelow, U.S. Department of Justice, Civil Division, Torts Branch; Barbara L. Herwig, Robert M. Loeb, Michael Abate, U.S. Department of Justice, Civil Division, Appellate Staff, on the brief), for Defendant-Appellee John Ashcroft, the official capacity Defendants-Appellees, and the United States.

JEREMY A. LAMKEN (John J. Cassidy, Jamie S. Kilberg, Paul J. Nathanson, on the brief), Baker Botts L.L.P., Washington D.C.; Stephen L. Braga (on the brief), Ropes & Gray L.L.P., Washington D.C., for Defendant-Appellee Larry D. Thompson.

Robin L. Goldfaden, American Civil Liberties Union Foundation, Immigrants' Rights Project, San Francisco, CA, for Amici Curiae American Civil Liberties Union and New York Civil Liberties Union in support of Plaintiff-Appellant.

Burt Neuborne, New York, NY, for Amici Curiae Norman Dorsen, Helen Hershkoff, Frank Michelman, Burt Neuborne, and David L. Shapiro, in support of Plaintiff-Appellant.

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Nancy Morawetz, New York University School of Law, New York, NY, for Amici Curiae Law Professors in support of Plaintiff-Appellant.

Alexander Yanos, Freshfields Bruckhaus Deringer US LLP, New York, NY, for Amicus Curiae Redress Trust in support of Plaintiff-Appellant.

Before: JACOBS, Chief Judge, McLAUGHLIN,* CALABRESI, CABRANES, POOLER, SACK,** SOTOMAYOR,*** PARKER, ** RAGGI, WESLEY,

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* Senior Circuit Judge McLaughlin was a member of the initial three-judge panel that heard this appeal and is therefore eligible to participate in in banc rehearing. See 28 U.S.C. § 46(c)(1).

** Senior Circuit Judges Calabresi, Sack, and Parker, who assumed senior status during the course of in banc proceedings, are entitled to participate pursuant to 28 U.S.C. § 46(c)(2).

*** The Honorable Sonia Sotomayor, who was originally a member of the in banc panel and who participated in oral argument, was elevated to the Supreme Court on August 8,

HALL, and LIVINGSTON, Circuit Judges. KATZMANN, Circuit Judge, took no part in the consideration or decision of the case.

JACOBS, C.J., filed the majority opinion in which MCLAUGHLIN, CABRANES, RAGGI, WESLEY, HALL, and LIVINGSTON, JJ., joined.

CALABRESI, J., filed a dissenting opinion in which POOLER, SACK, and PARKER, JJ., joined.

POOLER, J., filed a dissenting opinion in which CALABRESI, SACK, and PARKER, JJ., joined.

SACK, J., filed a dissenting opinion in which CALABRESI, POOLER, and PARKER, JJ., joined.

PARKER, J., filed a dissenting opinion in which CALABRESI, POOLER, and SACK, JJ., joined.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Trager, J.) dismissing Plaintiff-Appelant Maher Arar's complaint against the Attorney General of the United States, the Secretary of Homeland Security, the Director of the Federal Bureau of Investigation, and others, including senior immigration officials. Arar alleges that he was detained while changing planes at Kennedy Airport in New York (based on a warning from Canadian authorities that he was a

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2009.

member of Al Qaeda), mistreated for twelve days while in United States custody, and then removed to Syria via Jordan pursuant to an inter-governmental understanding that he would be detained and interrogated under torture by Syrian officials. The complaint alleges a violation of the Torture Victim Protection Act ("TVPA") and of his *Fifth Amendment* substantive due process rights arising from the conditions of his detention in the United States, the denial of his access to counsel and to the courts while in the United States, and his detention and torture in Syria.

The district court dismissed the complaint (with leave to re-plead only as to the conditions of detention in the United States and his access to counsel and the courts during that period) and Arar timely appealed (without undertaking to amend). *Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006)*. A three-judge panel of this Court unanimously held that: (1) the District Court had personal jurisdiction over Thompson, Ashcroft, and Mueller; (2) Arar failed to state a claim under the TVPA; and (3) Arar failed to establish subject matter jurisdiction over his request for a declaratory judgment. *Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008)*. A majority of the panel also dismissed Arar's Bivens claims, with one member of the panel dissenting. Id. The Court voted to rehear the appeal in banc. We now affirm.

We have no trouble affirming the district court's conclusions that Arar sufficiently alleged per-

sonal jurisdiction over the defendants who challenged it, and that Arar lacks standing to seek declaratory relief. We do not reach issues of qualified immunity or the state secrets privilege. As to the TVPA, we agree with the unanimous position of the panel that Arar insufficiently pleaded that the alleged conduct of United States officials was done under color of foreign law. We agree with the district court that Arar insufficiently pleaded his claim regarding detention in the United States, a ruling that has been reinforced by the subsequent authority of *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Our attention is therefore focused on whether Arar's claims for detention and torture in Syria can be asserted under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)* ("Bivens").

To decide the Bivens issue, we must determine whether Arar's claims invoke Bivens in a new context; and, if so, whether an alternative remedial scheme was available to Arar, or whether (in the absence of affirmative action by Congress) "'special factors counsel[] hesitation.'" See *Wilkie v. Robbins, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)* (quoting *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)*). This opinion holds that "extraordinary rendition" is a context new to Bivens claims, but avoids any categorical ruling on alternative remedies--because the dominant holding of this opinion is that, in the context of ex-

traordinary rendition, hesitation is warranted by special factors. We therefore [*564] affirm. (The term "rendition" and its related usages are defined and discussed in the margin.[1])

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[1] The term "rendition" refers to the transfer of a fugitive from one state to another or from one country to another. See Black's Law Dictionary 1410 (9th ed. 2004) (defining "rendition" as "[t]he return of a fugitive from one state to the state where the fugitive is accused or was convicted of a crime"); see also Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.9(c) ("[I]nterstaterendition[ ] is specifically provided for in the United States Constitution. In order to implement the rendition clause, Congress enacted the Federal Rendition Act, which requires that the demanding state produce 'a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor.'" (footnotes omitted)). In the international context, "extradition" is a "distinct form of rendition" in which "one [country] surrenders a person within its territorial jurisdiction to a requesting [country] via a formal legal process, typically established by treaty between the countries." Cong. Research Serv., Renditions: Constraints Imposed by Laws on Torture 1 (2009); see also 1 Oppenheim's International Law §§ 415-16 (9th ed. 1996). Although most international renditions occur under a formal extradition treaty, renditions also occur outside the scope of extradition treaties, often as a matter of international comity. See 1 Oppenheim, supra, § 416; Cong. Research Serv., supra, at 1; see also *18 U.S.C. § 3181(b)* (permitting, "in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government"). The terms "'irregular rendition' and 'extraordinary rendition' have been used to refer to the *extrajudicial* transfer of a person from one [country] to another." Cong. Research Serv., supra, at 1; see also Black's Law Dictionary 1410 (9th ed. 2009) (defining "extraordinary rendition" as "[t]he transfer, without formal charges, trial, or court approval, of a

Our ruling does not preclude judicial review and oversight in this context. But if a civil remedy in damages is to be created for harms suffered in the context of extraordinary rendition, it must be created by Congress, which alone has the institutional competence to set parameters, delineate safe harbors,

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person suspected of being a terrorist or supporter of a terrorist group to a foreign nation for imprisonment and interrogation on behalf of the transferring nation"). As we understand and use the term here, "extraordinary rendition" does not, by itself, imply that a subject of extraordinary rendition will be treated as Arar alleges he was treated during and after the rendition alleged in this action.

The United States Department of State records that, between 1993 and 2001, "rendition" provided the means for obtaining custody of ten suspected terrorists and "extradition" applied to another four suspects. See U.S. Dep't of State, Patterns of Global Terrorism 2001, App. D: Extraditions and Renditions of Terrorists to the United States. Accordingly, the rendition of suspected terrorists outside the mechanisms established by extradition treaties--so-called extraordinary rendition--had been employed as a means of combating terrorists for nearly a decade prior to the events giving rise to this litigation. See John B. Bellinger III, Legal Adviser, U.S. Dep't of State, Letter to the Editor, Wall St. J., July 5, 2006, at A25 (discussing the renditions of suspected terrorists Ramzi Yousef and Mir Aimal Kansi to the United States and the rendition of Illich Ramirez Sanchez, also known as "Carlos the Jackal," by French authorities from the Sudan to France, "which was subsequently upheld by the European Commission on Human Rights"), reprinted in Digest of United States Practice in International Law 162-63 (Sally J. Cummings ed., 2006); see also Remarks of Condoleezza Rice, U.S. Sec'y of State (Dec. 5, 2005) ("For decades, the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice."), in Digest of United States Practice in International Law 100, 102 (Sally J. Cummings ed., 2005).

and specify relief. If Congress chooses to legislate on this [*565] subject, then judicial review of such legislation would be available.

Applying our understanding of Supreme Court precedent, we decline to create, on our own, a new cause of action against officers and employees of the federal government. Rather, we conclude that, when a case presents the intractable "special factors" apparent here, see supra at 36-37, it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress--and not for us as judges--to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation. Administrations past and present have reserved the right to employ rendition, see David Johnston, U.S. Says Rendition to Continue, but with More Oversight, N.Y. Times, Aug. 24, 2009, and not withstanding prolonged public debate, Congress has not prohibited the practice, imposed limits on its use, or created a cause of action for those who allege they have suffered constitutional injury as a consequence.

I

Arar's complaint sets forth the following factual allegations.

Arar is a dual citizen of Syria, where he was born and raised, and of Canada, to which his family immigrated when he was 17.

While on vacation in Tunisia in September 2002, Arar was called back to work in Montreal. His itinerary called for stops in Zurich and New York.

Arar landed at Kennedy Airport around noon on September 26. Between planes, Arar presented his Canadian passport to an immigration official who, after checking Arar's credentials, asked Arar to wait nearby. About two hours later, Arar was fingerprinted and his bags searched. Between 4 p.m. and 9 p.m., Arar was interviewed by an agent from the Federal Bureau of Investigation ("FBI"), who asked (inter alia) about his relationships with certain individuals who were suspected of terrorist ties. Arar admitted knowing at least one of them, but denied being a member of a terrorist group. Following the FBI interview, Arar was questioned by an official from the Immigration and Nationalization Service ("INS) for three more hours; he continued to deny terrorist affiliations.

Arar spent the night alone in a room at the airport. The next morning (September 27) he was questioned by FBI agents from approximately 9 a.m. until 2 p.m.; the agents asked him about Osama Bin Laden, Iraq, Palestine, and other things. That evening, Arar was given an opportunity to return voluntarily to Syria. He refused, citing a fear of torture,

and asked instead to go to Canada or Switzerland. Later that evening, he was transferred to the Metropolitan Detention Center ("MDC") in Brooklyn, where he remained until October 8.

On October 1, the INS initiated removal proceedings, and served Arar with a document stating that he was inadmissible because he belonged to a terrorist organization. Later that day, he called his mother-in-law in Ottawa--his prior requests to place calls and speak to a lawyer having been denied or ignored. His family retained a lawyer to represent him and contacted the Canadian Consulate in New York.

A Canadian consular official visited Arar on October 3. The next day, immigration officers asked Arar to designate in writing the country to which he would want to be removed. He designated Canada. On the evening of October 5, Arar met with his [*566] attorney. The following evening, a Sunday, Arar was again questioned by INS officials. The INS District Director in New York left a voicemail message on the office phone of Arar's attorney that the interview would take place, but the attorney did not receive the message in time to attend. Arar was told that she chose not to attend. In days following, the attorney was given false information about Arar's whereabouts.

On October 8, 2002, Arar learned that the INS had: (1) ordered his removal to Syria, (2) made a (re-

quired) finding that such removal would be consistent with Article 3 of the Convention Against Torture ("CAT"),[2] and (3) barred him from reentering the United States for five years. He was found inadmissible to the United States on the basis of *8 U.S.C. § 1182(a)(3)(B)(i)(V)*, which provides that any alien who "is a member of a terrorist organization" is inadmissible to the United States. The finding was based on Arar's association with asuspected terrorist and other (classified) information. Thereafter, Defendant J. Scott Blackman, an INS Regional Director, made a determination that Arar was clearly and unequivocally a member of Al Qaeda and inadmissible to the United States. A "Final Notice of Inadmissibility," dated October 8, and signed by Defendant Deputy Attorney General Larry Thompson, stated that Arar's removal to Syria would be consistent with the CAT, notwithstanding Arar's articulated fear of torture.

Later that day, Arar was taken to New Jersey, whence he flew in a small jet to Washington, D.C., and then to Amman, Jordan. When he arrived in

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[2] Article 3 of the Convention Against Torture "prohibits any state party to the Convention from expelling, returning or extraditing any person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture, and provides that the determination of whether such grounds exist [must take] into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." *Tun v. INS, 445 F.3d 554, 566 (2d Cir. 2006)* (internal quotation marks, brackets, and ellipsis omitted).

Amman on October 9, he was handed over to Jordanian authorities who treated him roughly and then delivered him to the custody of Syrian officials, who detained him at a Syrian Military Intelligence facility. Arar was in Syria for a year, the first ten months in an underground cell six feet by three, and seven feet high. He was interrogated for twelve days on his arrival in Syria, and in that period was beaten on his palms, hips, and lower back with a two-inch-thick electric cable and with bare hands. Arar alleges that United States officials conspired to send him to Syria for the purpose of interrogation under torture, and directed the interrogations from abroad by providing Syria with Arar's dossier, dictating questions for the Syrians to ask him, and receiving intelligence learned from the interviews.

On October 20, 2002, Canadian Embassy officials inquired of Syria as to Arar's whereabouts. The next day, Syria confirmed to Canada that Arar was in its custody; that same day, interrogation ceased. Arar remained in Syria, however, receiving visits from Canadian consular officials. On August 14, 2003, Arar defied his captors by telling the Canadians that he had been tortured and was confined to a small underground cell. Five days later, after signing a confession that he had trained as a terrorist in Afghanistan, Arar was moved to various locations. On October 5, 2003, Arar was released to the custody of a Canadian embassy official in [*567] Damascus, and was flown to Ottawa the next day.

II

On January 22, 2004, Arar filed a four-count complaint in the Eastern District of New York seeking damages from federal officials for harms suffered as a result of his detention and confinement in the United States and his detention and interrogation in Syria. Count One of Arar's complaint seeks relief under the Torture Victim Protection Act ("TVPA"), *28 U.S.C. § 1350* note (a)(1) (the "TVPA claim"). Counts Two and Three seek relief under the *Fifth Amendment* for Arar's alleged torture in Syria (Count Two) and his detention there (Count Three). Count Four seeks relief under the *Fifth Amendment* for Arar's detention in the United States prior to his removal to Syria. Arar also seeks a declaratory judgment that defendants' conduct violated his "constitutional, civil, and human rights."

Defendants-Appellees moved to dismiss the complaint pursuant to *Federal Rule of Civil Procedure 12(b)*, challenging personal jurisdiction over Defendants Ashcroft, Thompson, and Mueller and challenging subject-matter jurisdiction as to the claims alleging confinement and torture in Syria on the ground that they arise from an order of removal and are therefore subject to the jurisdictional bar of the Immigration and Nationality Act (see infra Part VI). It was also argued that Arar lacked standing to seek a declaratory judgment.

On February 16, 2006, the district court dismissed Counts One, Two, and Three with prejudice, and Count Four without prejudice. *Arar v. Ashcroft, 414 F. Supp. 2d 250, 287-88 (E.D.N.Y. 2006).* The district court also concluded that Arar lacked standing to bring a claim for declaratory relief. *Id. at 258-59.*

Arar elected not to re-plead Count Four, and on August 17, 2006, the district court entered judgment dismissing all of Arar's claims. Arar timely appealed. A divided three-judge panel of this Court affirmed on June 30, 2008. *Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008).* The Court voted to rehear the case in banc, and oral argument was heard on December 9, 2008.

III

We review de novo the district court's decision to grant a motion to dismiss. *In re NYSE Specialists Sec. Litig., 503 F.3d 89, 95 (2d Cir. 2007).* In so doing, we accept as true the factual allegations of the complaint, and construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff. *Roth v. Jennings, 489 F.3d 499, 501 (2d Cir. 2007)*; see also *Conyers v. Rossides, 558 F.3d 137, 143 (2d Cir. 2009).*

At the outset, we conclude (as the panel concluded unanimously) that Arar: (1) sufficiently alleged personal jurisdiction over the defendants, and

(2) has no standing to seek declaratory relief; in addition, because we dismiss the action for the reasons set forth below, we need not (and do not) reach the issues of qualified immunity or the state secrets privilege.

This opinion owes a debt to the panel opinions.

IV

The TVPA creates a cause of action for damages against any "individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture." *28 U.S.C. § 1350* note (a)(1). Count One of Arar's complaint alleges that the defendants conspired with Jordanian and Syrian officials to have Arar tortured in direct violation of the TVPA.

[*568] Any allegation arising under the TVPA requires a demonstration that the defendants acted under color of foreign law, or under its authority. *Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)*. "In construing the term[] . . . 'color of law,' courts are instructed to look . . . to jurisprudence under *42 U.S.C. § 1983* . . . ." Id. (citing H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991) reprinted in 1992 U.S.C.C.A.N. 84, 87). Under *section 1983*, "[t]he traditional definition of acting under color of state law requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the au-

thority of state law.'" *West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)* (quoting *United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941)).* The determination as to whether a non-state party acts under color of state law requires an intensely fact-specific judgment unaided by rigid criteria as to whether particular conduct may be fairly attributed to the state. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001).* A federal officer who conspires with a state officer may act under color of state law, see *Beechwood Restorative Care Ctr. v. Leeds, 436 F.3d 147, 154 (2d Cir. 2006)*; but since "federal officials typically act under color of *federal* law," they are rarely deemed to have acted under color of state law. *Strickland ex rel. Strickland v. Shalala, 123 F.3d 863, 866 (6th Cir. 1997)* (emphasis in original).

Accordingly, to state a claim under the TVPA, Arar must adequately allege that the defendants possessed power under Syrian law, and that the offending actions (i.e., Arar's removal to Syria and subsequent torture) derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power. The complaint contains no such allegation. Arar has argued that his allegation of conspiracy cures any deficiency under the TVPA. But the conspiracy allegation is that United States officials encouraged and facilitated the exercise of power by Syrians in Syria, not that the United States officials had or exercised

power or authority under Syrian law. The defendants are alleged to have acted under color of federal, not Syrian, law, and to have acted in accordance with alleged federal policies and in pursuit of the aims of the federal government in the international context. At most, it is alleged that the defendants encouraged or solicited certain conduct by foreign officials. Such conduct is insufficient to establish that the defendants were in some way clothed with the authority of Syrian law or that their conduct may otherwise be fairly attributable to Syria. See, e.g., *Harbury v. Hayden, 444 F. Supp. 2d 19, 42-43 (D.D.C. 2006)*, aff'd on other grounds, *522 F.3d 413, 380 U.S. App. D.C. 388 (D.C. Cir. 2008)*. We therefore agree with the unanimous holding of the panel and affirm the District Court's dismissal of the TVPA claim.[3]

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[3] Judge Pooler relies on a line of *section 1983* cases explaining when and how private conduct can constitute state action, and then reasons by analogy to deem the defendants' conduct in this case to have arisen under foreign (Syrian) law. See Dissent of Judge Pooler at 8-9. Under this theory, Judge Pooler would allow a person tortured abroad to sue an official of the United States government, who in the performance of her official duties, "encourage[d]," "facilitat[ed]," or "solicit[ed]" the mistreatment. Id. at 10. Notably, she cites no authority for this remarkable proposition, which would render a U.S. official an official of a foreign government when she deals with that foreign state on matters involving intelligence, military, and diplomatic affairs. At least one commentator has proposed a legislative amendment to bring the law into line with what Judge Pooler thinks it is, or should be. See Richard Henry Seamon, U.S. Torture as a Tort, *37 Rutgers L.J. 715, 802, 804 (2006)* ("Under current law, U.S. officials can seldom be held civilly liable for torture . . . . Congress could amend the TVPA to extend the cause of action to the victims of torture inflicted under color of federal law.").

V [*569]

Count Four of the complaint alleges that the conditions of confinement in the United States (prior to Arar's removal to Syria), and the denial of access to courts during that detention, violated Arar's substantive due process rights under the *Fifth Amendment*. The District Court dismissed this claim-- without prejudice--as insufficiently pleaded, and invited Arar to re-plead the claim in order to "articulate more precisely the judicial relief he was denied" and to "name those defendants that were personally involved in the alleged unconstitutional treatment." *Arar, 414 F. Supp. 2d at 286, 287.* Arar elected (in his counsel's words) to "stand on the allegations of his original complaint."

On a motion to dismiss, courts require "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*; see also *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009).* "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly, 550 U.S. at 555.* Broad allegations of conspiracy are insufficient; the plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Webb v. Goord, 340 F.3d 105, 110 (2d Cir. 2003)* (internal quotation marks omitted) (addressing conspiracy claims under *42 U.S.C. § 1985*). Furthermore, a plaintiff in a Bivens action is required to al-

lege facts indicating that the defendants were personally involved in the claimed constitutional violation. See *Ellis v. Blum, 643 F.2d 68, 85 (2d Cir. 1981)*; see also *Thomas v. Ashcroft, 470 F.3d 491, 496 (2d Cir. 2006)*.

Arar alleges that "Defendants"--undifferentiated--"denied Mr. Arar effective access to consular assistance, the courts, his lawyers, and family members" in order to effectuate his removal to Syria. But he fails to specify culpable action taken by any single defendant, and does not allege the "meeting of the minds" that a plausible conspiracy claim requires. He alleges (in passive voice) that his requests to make phone calls "were ignored," and that "he was told" that he was not entitled to a lawyer, but he fails to link these denials to any defendant, named or unnamed. Given this omission, and in view of Arar's rejection of an opportunity to re-plead, we agree with the District Court and the panel majority that this Count of the complaint must be dismissed.

We express no view as to the sufficiency of the pleading otherwise, that is, whether the conduct alleged (if plausibly attributable to defendants) would violate a constitutionally protected interest.[4] To the extent that this claim may be deemed to be a Bivens-

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[4] We need not, therefore, consider the panel's holding that Arar failed "to establish that he possessed any entitlement to a pre-removal hearing" or "to the assistance of counsel." *Arar, 532 F.3d at 187-88*.

type action, it may raise some of the special factors considered later in this opinion.

VI

Arar's remaining claims seek relief on the basis of torture and detention in Syria, and are cast as violations of substantive [*570] due process. At the outset, Defendants argue that the jurisdictional bar of the INA deprived the District Court of subject-matter jurisdiction over these counts because Arar's removal was conducted pursuant to a decision that was "at the discretion" of the Attorney General.

"[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy, 342 U.S. 580, 588-89, 72 S. Ct. 512, 96 L. Ed. 586 (1952).* Accordingly, the INA requires an alien to seek relief only through judicial review of a removal order in the appropriate court of appeals; it entirely forecloses judicial review of decisions of the Attorney General or the Secretary of Homeland Security specified by the INA to be

within the discretion of those officers. See *8 U.S.C. § 1252.*[5]

However, the application of the INA's jurisdictional bar is problematic in this case because the proceedings under the INA are alleged to have been irregular in several respects.

First, the complaint alleges that the government took the following actions that impaired Arar's timely ability to seek the judicial review normally afforded under the INA and to receive any meaningful relief: denying his requests to contact an attorney or his family; misleading his lawyer (after one was retained for him) as to his location and status, thereby frustrating any advocacy on his behalf; and serving the removal order on Arar en route to Am-

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[5] *8 U.S.C. § 1252(b)(9)* provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order." *Subsection 1252(a)(5)*, in turn, states that "a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal." Finally, pursuant to *§ 1252 (a)(2)(B)*:

> [N]o court shall have jurisdiction to review . . .
>
> (ii) any . . . decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified . . . to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum].

man, when he no longer had access to his attorney and could not make use of the review process. The complaint also alleges that the government undertook extraordinary rendition in clear violation of the protections afforded aliens by the INA, suggesting that the government itself might not have viewed the INA as the real source of its removal authority in this context. However, mere allegations of obstruction generally do not circumvent a congressionally mandated remedial scheme. Otherwise, limitations on the jurisdiction of the district courts could easily be evaded and thwarted.

Second, although the INA governs the status of aliens in transit at United States airports, and clearly has a role in such circumstances, see *8 U.S.C. § 1182(d)(4)(C)*, this is not a typical immigration case according to the complaint: Arar took no step to enter or stay in this country; he was changing planes to go elsewhere, repeatedly expressed his desire to return to Canada, and was ticketed to Montreal. Even though this case does not present the familiar fact pattern of an alien trying to enter or remain in the United States, our immigration laws apply [*571] with equal force to aliens who seek admission to our country and to aliens whom the government seeks to keep out of our country.

In short, it is not clear that the INA's judicial review provisions govern circumstances of involuntary rendition such as those alleged here. Indeed, rendition may take place in circumstances that in no

way implicate United States immigration laws, such as when a person is detained abroad and rendered to some third country.

Finally, even if the INA's jurisdictional bar is surmounted and review not foreclosed, Arar has alleged circumstances that would have prevented him from obtaining review. If, as he alleges, he was served with the removal order while he was already en route to Amman, the INA could have afforded him no relief then (and can afford him no affirmative relief at this time in this case).

In any event, we need not decide the vexed question of whether the INA bar defeats jurisdiction of Arar's substantive due process claims, because we conclude below that the case must be dismissed at the threshold for other reasons.

VII

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)*. The plaintiff in Bivens had been subjected to an unlawful, warrantless search which resulted in his arrest. *Bivens, 403 U.S. at 389-90*. The Supreme Court allowed him to state a

cause of action for money damages directly under the *Fourth Amendment*, thereby giving rise to a judicially-created remedy stemming directly from the Constitution itself. *Id. at 397.*

The purpose of the Bivens remedy "is to deter individual federal officers from committing constitutional violations." *Malesko, 534 U.S. at 70.* So a Bivens action is brought against individuals, and any damages are payable by the offending officers. *Carlson v. Green, 446 U.S. 14, 21, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).* Notwithstanding the potential breadth of claims that would serve that objective, the Supreme Court has warned that the Bivens remedy is an extraordinary thing that should rarely if ever be applied in "new contexts." See *Malesko, 534 U.S. at 69* (internal quotation marks omitted); *Schweiker v. Chilicky, 487 U.S. 412, 421, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*; see also *Dotson v. Griesa, 398 F.3d 156, 166 (2d Cir. 2005)* ("Because a Bivens action is a judicially created remedy . . . courts proceed cautiously in extending such implied relief . . . ."). In the 38 years since Bivens, the Supreme Court has extended it twice only: in the context of an employment discrimination claim in violation of the *Due Process Clause, Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*; and in the context of an *Eighth Amendment* violation by prison officials, *Carlson, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15*; see also *Wilkie v. Robbins, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)* ("[I]n most instances we have found a Bivens remedy un-

justified."); *Malesko, 534 U.S. at 68* ("[W]e have consistently refused to extend Bivens liability to any new context or new category of defendants."). Since Carlson in 1980, the Supreme Court has declined to extend the Bivens remedy in any new direction at all. Among the rejected contexts are: violations of federal employees' *First Amendment* [*572] rights by their employers, *Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)*; harms suffered incident to military service, *United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987)*; *Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)*; denials of Social Security benefits, *Schweiker, 487 U.S. at 412*; claims against federal agencies, *FDIC v. Meyer, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)*; claims against private corporations operating under federal contracts, *Malesko, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)*; and claims of retaliation by federal officials against private landowners, *Wilkie, 551 U.S. at 562*.

This case requires us to examine whether allowing this Bivens action to proceed would extend Bivens to a new "context," and if so, whether such an extension is advisable.

"Context" is not defined in the case law. At a sufficiently high level of generality, any claim can be analogized to some other claim for which a Bivens action is afforded, just as at a sufficiently high level of particularity, every case has points of distinction.

We construe the word "context" as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components.

The context of this case is international rendition, specifically, "extraordinary rendition." Extraordinary rendition is treated as a distinct phenomenon in international law. See supra note 1. Indeed, law review articles that affirmatively advocate the creation of a remedy in cases like Arar's recognize "extraordinary rendition" as the context. See, e.g., Peter Johnston, Note, Leaving the Invisible Universe: Why All Victims of Extraordinary Rendition Need a Cause of Action Against the United States, *16 J.L. & Pol'y 357, 363 (2007)*. More particularly, the context of extraordinary rendition in Arar's case is the complicity or cooperation of United States government officials in the delivery of a non-citizen to a foreign country for torture (or with the expectation that torture will take place). This is a "new context": no court has previously afforded a Bivens remedy for extraordinary rendition.

Once we have identified the context as "new," we must decide whether to recognize a Bivens remedy in that environment of fact and law. The Supreme Court tells us that this is a two-part inquiry. In order to determine whether to recognize a Bivens remedy in a new context, we must consider: whether there is an alternative remedial scheme available to the plaintiff; and whether "'special factors counsel[]

hesitation'" in creating a Bivens remedy. *Wilkie, 551 U.S. at 550* (quoting *Bush, 462 U.S. at 378*).

VIII

There are several possible alternative remedial schemes here. Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration. The INA provides for review of final orders of removal, including review of the government's designation of a particular destination country and many (albeit not all) decisions of the Attorney General and the Secretary of Homeland Security. See *8 U.S.C. § 1252*; *Mendis v. Filip, 554 F.3d 335, 338 (2d Cir. 2009)*. Congress has supplemented this general remedial scheme with specific guidance for particular contexts by enacting (i) the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), *8 U.S.C. § 1231* note; see also *8 C.F.R. § 208.16(c)*; and (ii) the TVPA, which, as already discussed, provides no remedy to [*573] Arar. At the same time, Congress has expressly limited review of the removal of aliens who (like Arar) are removable for reasons related to national security. See *8 U.S.C. § 1225(c)*. Congress has also regularly modified the various review mechanisms to account for perceived difficulties and complications. See, e.g., REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546. In light of the complexity of the remedial scheme Congress has created

(and frequently amended), we would ordinarily draw a strong inference that Congress intended the judiciary to stay its hand and refrain from creating a Bivens action in this context. See *Wilkie, 551 U.S. at 554*; *Schweiker, 487 U.S. at 424-29*; *Bush, 462 U.S. at 388.*

We recognize, however, that any reliance on the INA as an alternative remedial scheme presents difficulties for the same reasons discussed in Part VI above. Arar has alleged that he was actively prevented from seeking any meaningful review and relief through the INA processes. In the end, we need not decide whether an alternative remedial scheme was available because, "even in the absence of an alternative [remedial scheme], a Bivens remedy is a subject of judgment . . . [in which] courts must . . . pay particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie, 551 U.S. at 550* (internal quotation marks omitted).[6] Such special factors are clearly present in the new context of this case, and they sternly counsel hesitation.

IX

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[6] Accordingly, we have no occasion to consider the panel's conclusion that the "review procedures set forth by the INA provide a convincing reason for us to resist recognizing a Bivens cause of action for Arar's claims." *Arar, 532 F.3d at 180* (internal quotation marks and citation omitted).

When the Bivens cause of action was created in 1971, the Supreme Court explained that such a remedy could be afforded because that "case involve[d] no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens, 403 U.S. at 396*. This prudential limitation was expressly weighed by the Court in *Davis, 442 U.S. at 245-46*, and *Carlson, 446 U.S. at 18-19*, and such hesitation has defeated numerous Bivens initiatives, see, e.g., *Stanley, 483 U.S. at 683-84*; *Chappell, 462 U.S. at 304*; *Wilkie, 551 U.S. at 554-55*; *Dotson, 398 F.3d at 166-67*. Among the "special factors" that have "counsel[ed] hesitation" and thereby foreclosed a Bivens remedy are: military concerns, *Stanley, 483 U.S. at 683-84*; *Chappell, 462 U.S. at 304*; separation of powers, *United States v. City of Philadelphia, 644 F.2d 187, 200 (3d Cir. 1980)*; the comprehensiveness of available statutory schemes, *Dotson, 398 F.3d at 166*; national security concerns, *Beattie v. Boeing Co., 43 F.3d 559, 563 (10th Cir. 1994)*; and foreign policy considerations, *United States v. Verdugo-Urquidez, 494 U.S. 259, 274, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)*.

Two principles emerge from this review of case law:

> "Special factors" is an embracing category, not easily defined; but it is limited in terms to factors that provoke "hesitation." While special factors should be substantial enough to justify the absence of a damages remedy for a [*574]

> wrong, no account is taken of countervailing factors that might counsel alacrity or activism, and none has ever been cited by the Supreme Court as a reason for affording a Bivens remedy where it would not otherwise exist.
>
> The only relevant threshold--that a factor "counsels hesitation"--is remarkably low. It is at the opposite end of the continuum from the unflagging duty to exercise jurisdiction. Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. "Hesitation" is "counseled" whenever thoughtful discretion would pause even to consider.[7]

Judge Pooler labels these two principles "dicta," see Dissent of Judge Pooler at 2, but they are not. They are integral to the holding in this in banc case, because we do not take account of countervailing factors and because we apply the standard we announce.

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[7] Judge Pooler labels these two principles "dicta," see Dissent of Judge Pooler at 2, but they are not. They are integral to the holding in this in banc case, because we do not take account of countervailing factors and because we apply the standard we announce.

With these principles in mind, we adduce, one by one, special factors that bear upon the recognition of a Bivens remedy for rendition.

X

Although this action is cast in terms of a claim for money damages against the defendants in their individual capacities, it operates as a constitutional challenge to policies promulgated by the executive. Our federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a private action for money damages against individual policymakers is not one of them. A Bivens action is sometimes analogized to an action pursuant to *42 U.S.C. § 1983*, but it does not reach so far as to create the federal counterpart to an action under *Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*. Here, we need not decide categorically whether a Bivens action can lie against policymakers because in the context of extraordinary rendition, such an action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation. Our holding need be no broader.

A. Security and Foreign Policy

The Executive has practiced rendition since at least 1995. See Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlan-

tic Relations: Joint Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs, 110th Cong. 15 (2007) (statement of Michael F. Scheuer, Former Chief, Bin Laden Unit, CIA). Arar gives "the mid-1990s" as the date for the inception of the policy under which he was sent to Syria for torture. Pl. Maher Arar's Mem. of Law in Opp'n to Defs.' Invocation of the State Secrets Privilege, Mar. 14, 2005, at 6. A suit seeking a damages remedy against senior officials who implement such a policy is in critical respects a suit against the government as to which the government has not waived sovereign immunity. Such a suit unavoidably influences government policy, probes government secrets, invades government interests, enmeshes government lawyers, and thereby elicits government funds for settlement. (Canada has already paid Arar $ 10 million.[8])

It is a substantial understatement to say that one must hesitate before extending [*575] Bivens into such a context. A suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and ra-

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[8] See Press Release and Announcement, Stephen Harper, Prime Minister of Can. (Jan. 26, 2007), http://pm.gc.ca/eng/media.asp?id=1510; Ottawa Reaches $10M Settlement with Arar, CBC News, Jan. 26, 2007, http://www.cbc.ca/canada/story/2007/01/25/arar-harper.html.

tionale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns. It is clear from the face of the complaint that Arar explicitly targets the "policy" of extraordinary rendition; he cites the policy twice in his complaint, and submits documents and media reports concerning the practice. His claim cannot proceed without inquiry into the perceived need for the policy, the threats to which it responds, the substance and sources of the intelligence used to formulate it, and the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries.

The Supreme Court has expressly counseled that matters touching upon foreign policy and national security fall within "an area of executive action 'in which courts have long been *hesitant* to intrude'" absent congressional authorization. *Lincoln v. Vigil, 508 U.S. 182, 192, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993)* (emphasis added) (quoting *Franklin v. Massachusetts, 505 U.S. 788, 819, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992)* (Stevens, J., concurring in part and concurring in the judgment)). It "has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive. . . . Thus, unless Congress specifically has provided otherwise, courts traditionally have been *reluctant* to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan, 484 U.S. 518, 529-30, 108 S. Ct. 818, 98 L.*

Ed. 2d 918 (1988) (emphasis added) (quoting *Haig v. Agee, 453 U.S. 280, 293-94, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981))*. This "hesita[tion]" and "reluctan[ce]" is counseled by:

> the constitutional separation of powers among the branches of government, see *United States v. Curtiss-Wright Exp. Co., 299 U.S. 304, 320-22, 57 S. Ct. 216, 81 L. Ed. 255 (1936)* (noting the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" and discussing the difficulties presented by congressional--let alone judicial-- involvement in such affairs), and the limited institutional competence of the judiciary, see *Boumediene v. Bush, 128 S. Ct. 2229, 2276-77, 171 L. Ed. 2d 41 (2008)* ("Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security."); see also *Munaf v. Geren, 128 S. Ct. 2207, 2226, 171 L. Ed. 2d 1 (2008)* ("The Judiciary is not suited to [make] determinations [in the area of foreign affairs] that

> would . . . undermine the Government's ability to speak with one voice in this area. In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of any ally, and what to do about it if there is." (citation omitted)).

True, courts can--with difficulty and resourcefulness-- consider state secrets and even reexamine judgments made in the foreign affairs context *when they must*, [*576] that is, when there is an unflagging duty to exercise our jurisdiction. Otherwise:

> [T]he special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad. The foreign affairs implications of suits such as this cannot be ignored--their ability to produce what the Supreme Court has called in another context "embarrassment of our government abroad" through "multifarious pronouncements by various departments on one question." Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens'

> using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.

Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209, 248 U.S. App. D.C. 146 (D.C. Cir. 1985) (Scalia, J.) (quoting *Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)).* Absent clear congressional authorization, the judicial review of extraordinary rendition would offend the separation of powers and inhibit this country's foreign policy. It does not matter for our purposes whether such consequences would flow from innocent interference or from deliberate manipulation. These concerns must counsel hesitation in creating a new damages remedy that Congress has not seen fit to authorize.

B. Classified Information

The extraordinary rendition context involves exchanges among the ministries and agencies of foreign countries on diplomatic, security, and intelligence issues. The sensitivities of such classified material are "too obvious to call for enlarged discussion." *Dep't of Navy, 484 U.S. at 529* (internal quotation marks omitted). Even the probing of these matters entails the risk that other countries will become less willing to cooperate with the United States in sharing intelligence resources to counter terrorism. "At its core," as the panel opinion observed, "this

suit arises from the Executive Branch's alleged determination that (a) Arar was affiliated with Al Qaeda, and therefore a threat to national security, and (b) his removal to Syria was appropriate in light of U.S. diplomatic and national security interests." *Arar, 532 F.3d at 181.* To determine the basis for Arar's alleged designation as an Al Qaeda member and his subsequent removal to Syria, the district court would have to consider what was done by the national security apparatus of at least three foreign countries, as well as that of the United States. Indeed, the Canadian government--which appears to have provided the intelligence that United States officials were acting upon when they detained Arar--paid Arar compensation for its role in the events surrounding this lawsuit, but has *also* asserted the need for Canada itself to maintain the confidentiality of certain classified materials related to Arar's claims.[9]

C. Open Courts

Allegations of conspiracy among government agencies that must often work in secret inevitably implicate a lot of classified material that cannot be introduced into the public record. Allowing Arar's claims to proceed would very likely mean that some documents or information [*577] sought by Arar

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[9] See Ottawa Trying to Hold Back Documents from Arar Inquiry, CBC News, Apr. 29, 2004, http://www.cbc.ca/canada/story/2004/04/29/arar040429.html.

would be redacted, reviewed in camera, and otherwise concealed from the public. Concealment does not bespeak wrongdoing: in such matters, it is just as important to conceal what has not been done. Nevertheless, these measures would excite suspicion and speculation as to the true nature and depth of the supposed conspiracy, and as to the scope and depth of judicial oversight. Indeed, after an inquiry at oral argument as to whether classified materials relating to Arar's claims could be made available for review in camera, Arar objected to the supplementation of the record with material he could not see. See Letter from David Cole, Counsel for Maher Arar (Dec. 23, 2008). After pointing out that such materials are unnecessary to the adjudication of a motion on the pleadings (where the allegations of the complaint must be accepted as true), Arar protested that any materials submitted ex parte and in camera would not be subject to adversarial testing and that consideration of such documents would be "presumptively unconstitutional" since they would result in a decision "on the basis of secret information available to only one side of the dispute."

The court's reliance on information that cannot be introduced into the public record is likely to be a common feature of any Bivens actions arising in the context of alleged extraordinary rendition. This should provoke hesitation, given the strong preference in the Anglo-American legal tradition for open court proceedings, a value incorporated into modern *First* and *Sixth Amendment* law. See *U.S. Const.*

amend. VI (guaranteeing the right to a "*public* trial" (emphasis added)); *Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984)* (noting that the *First Amendment* secures "a right of access to civil proceedings"). The risk of limiting access, of course, is that where a proceeding "has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted." *Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980)*. "[T]he appearance of justice can best be provided by allowing people to observe" proceedings. *Id. at 572*. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Id. This is especially true in the courts, where the guarantee of a public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver, 333 U.S. 257, 270, 68 S. Ct. 499, 92 L. Ed. 682 (1948)*.

Granted, there are circumstances in which a court may close proceedings to which a public right of access presumptively attaches. See *Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)*; *United States v. Alcantara, 396 F.3d 189, 199-200 (2d Cir. 2005)*; *United States v. Doe, 63 F.3d 121, 127-28 (2d Cir. 1995)*. And the problems posed

by the need to consider classified material are unavoidable in some criminal prosecutions and in other cases where we have a duty, imposed by Congress, to exercise jurisdiction. But this is not such a circumstance or such a case. The preference for open rather than clandestine court proceedings is a special factor that counsels hesitation in extending Bivens to the extraordinary rendition context.

XI

A government report states that this case involves assurances received from [*578] other governments in connection with the determination that Arar's removal to Syria would be consistent with Article 3 of the CAT. Office of Inspector General, Dep't of Homeland Sec., (Unclassified) The Removal of a Canadian Citizen to Syria 5, 22, 26-27 (2008).[10] This case is not unique in that respect. Cases in the context of extraordinary rendition are very likely to present serious questions relating to private diplomatic assurances from foreign countries received by federal officials, and this feature of such claims opens the door to graymail.

A. Assurances

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[10] We take judicial notice of the existence of this unclassified report and the scope of its contents, including the limited discussion of assurances. Notice is taken only that the report alleges that assurances were received, not as to the truth of that allegation or the reliability of those assurances.

The regulations promulgated pursuant to the FARRA explicitly authorize the removal of an alien to a foreign country following receipt from that country of sufficiently reliable assurances that the alien will not be tortured. See *8 C.F.R. § 208.18(c)*. Should we decide to extend Bivens into the extraordinary rendition context, resolution of these actions will require us to determine whether any such assurances were received from the country of rendition and whether the relevant defendants relied upon them in good faith in removing the alien at issue.

Any analysis of these questions would necessarily involve us in an inquiry into the work of foreign governments and several federal agencies, the nature of certain classified information, and the extent of secret diplomatic relationships. An investigation into the existence and content of such assurances would potentially embarrass our government through inadvertent or deliberate disclosure of information harmful to our own and other states.[11] Given the general allocation of authority over foreign relations to the political branches and the decidedly limited experience and knowledge of the federal judiciary regarding such matters, such an investigation

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[11] This risk is not necessarily abated by the undertakings of counsel. See, e.g., *United States v. Sattar, 395 F. Supp. 2d 79 (S.D.N.Y. 2005)* (denying attorney Lynne Stewart's motion for a judgment of acquittal following her conviction by a jury of, inter alia, conspiring to defraud the United States, conspiring to provide material support to carry out murder and kidnap in a foreign country, and making false statements).

would also implicate grave concerns about the separation of powers and our institutional competence. See, e.g., *Kiyemba v. Obama, 561 F.3d 509, 515, 385 U.S. App. D.C. 198 (D.C. Cir. 2009)* ("[S]eparation of powers principles . . . preclude the courts from second-guessing the Executive's assessment of the likelihood a detainee will be tortured by a foreign sovereign."). These considerations strongly counsel hesitation in acknowledging a Bivens remedy in this context.

B. Graymail

As emphasized above, Arar invokes Bivens to challenge policies promulgated and pursued by the executive branch, not simply isolated actions of individual federal employees. Such an extension of *Bivens* is without precedent and implicates questions of separation of powers as well as sovereign immunity. This, by itself, counsels hesitation; there is further reason to hesitate where, as in this case, the challenged government policies are the subject of classified communications: a possibility that such suits will make the government "vulnerable to 'graymail,' i.e., individual lawsuits brought to induce the [government] to settle a case (or prevent its filing) [*579] out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations," or otherwise compromise foreign policy efforts. *Tenet v. Doe, 544 U.S. 1, 11, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005).* We cast no aspersions on Arar, or his lawyers; this

dynamic inheres in any case where there is a risk that a defendant might "disclose classified information in the course of a trial." *United States v. Pappas, 94 F.3d 795, 799 (2d Cir. 1996).* This is an endemic risk in cases (however few) which involve a claim like Arar's.

The risk of graymail is itself a special factor which counsels hesitation in creating a Bivens remedy. There would be hesitation enough in an ordinary graymail case, i.e., where the tactic is employed against the *government*, which can trade settlement cash (or the dismissal of criminal charges) for secrecy. See *Tenet, 544 U.S. at 11*; *Pappas, 94 F.3d at 799.* But the graymail risk in a Bivens rendition case is uniquely troublesome. The interest in protecting military, diplomatic, and intelligence secrets is located (as always) in the *government*; yet a Bivens claim, by definition, is never pleaded against the government. See, e.g., *Malesko, 534 U.S. at 70.* So in a Bivens case, there is a dissociation between the holder of the non-disclosure interest (the government, which cannot be sued directly under Bivens) and the person with the incentive to disclose (the defendant, who cannot waive, but will be liable for any damages assessed). In a rendition case, the Bivens plaintiff could in effect pressure the individual defendants until the *government* cries uncle. Thus any Bivens action involving extraordinary rendition would inevitably suck the government into the case to protect its considerable interests, and--if dis-

closure is ordered--to appeal, or to suffer the disclosure, or to pay.

This pressure on the government to pay a settlement has (at least) two further perverse effects. First, a payment from the Treasury tends to obviate any payment or contribution by the individual defendants. Yet, "[Bivens] is concerned solely with deterring the unconstitutional acts of individual officers" by extracting payment from individual wrongdoers. *Malesko, 534 U.S. at 71.* When the government elects to settle a Bivens case which is susceptible to graymail, the individual wrongdoer pays nothing and the deterrent effect is lost. Second, the individual defendant in such a case has no incentive to resist discovery that imperils government interests; rather, discovery induces the government to settle. So in the extraordinary rendition context, there is a risk (or likelihood) that the government effectively becomes the real defendant in interest, and the named defendants become proxies that the government cannot control. Precisely because Bivens has never been approved as a Monell-like vehicle for challenging government policies, this factor also counsels hesitation in extending a private damages action in this context.[12]

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[12] Judge Calabresi does not discount the risk of graymail; he just minimizes the harm, equating it with settlement pressures that routinely inhere in *section 1983* litigation. However, "graymail" is a term of art, signifying the use of military or intelligence information as hostage for payment of money or a plea bargain. The prospect of graymail does not induce Judge Calabresi to pause because he sees graymail as part of the "ju-

In the end, a Bivens action based on rendition is--in all but name--a claim [*580] against the government.[13] It is not for nothing that Canada (the government, not an individual officer of it) paid Arar $ 10 million dollars.

XII

In the small number of contexts in which courts have implied a Bivens remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued. The guard who beat a prisoner should not have beaten him; the agent who searched without a warrant should have gotten one; and the immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes. This distinction may or may not amount to a special factor counseling hesitation in the implication

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dicial structures that *facilitate* the giving of compensation, at least to innocent victims . . . ." See Dissent of Judge Calabresi at 15.

[13] It is telling that, according to the Deputy Assistant Attorney General, Mr. Arar and his attorney went to the United States Congress and requested--without success--that it "clarify the ambiguity [in this area] with legislation and . . . give [Mr. Arar] reparations." Transcript of Arar In banc Oral Argument at 49. Cf. 153 Cong. Rec. D1384-02 (Oct. 18, 2007); Matthew Jaffe, Congress Hears Testimony in Arar Torture Case, ABC News, Oct. 18, 2007, http://abcnews.go.com/Politics/story?id=3746371&page=1.

of a Bivens remedy. But it is surely remarkable that the context of extraordinary rendition is so different, involving as it does a complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached.

Consider: should the officers here have let Arar go on his way and board his flight to Montreal? Canada was evidently unwilling to receive him; it was, after all, Canadian authorities who identified Arar as a terrorist (or did something that led their government to apologize publicly to Arar and pay him $ 10 million).

Should a person identified as a terrorist by his own country be allowed to board his plane and go on to his destination? Surely, that would raise questions as to what duty is owed to the other passengers and the crew.

Or should a suspected terrorist en route to Canada have been released on the Canadian border--over which he could re-enter the United States virtually at will? Or should he have been sent back whence his plane came, or to some third country? Should those governments be told that Canada thinks he is a terrorist? If so, what country would take him?

Or should the suspected terrorist have been sent to Guantanamo Bay or--if no other country

would take him--kept in the United States with the prospect of release into the general population? See *Zadvydas v. Davis, 533 U.S. 678, 699-700, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).*

None of this is to say that extraordinary rendition is or should be a favored policy choice. At the same time, the officials required to decide these vexed issues are "subject to the pull of competing obligations." *Lombardi v. Whitman, 485 F.3d 73, 83 (2d Cir. 2007).* Many viable actions they might consider "clash with other equally important governmental responsibilities." *Pena v. DePrisco, 432 F.3d 98, 114 (2d Cir. 2005)* (internal quotation marks omitted). Given the ample reasons for pause already discussed, we need not and do not rely on this consideration in concluding that it is inappropriate to extend Bivens to this context. Still, Congress is the appropriate branch of government to decide under what circumstances (if any) these kinds of policy decisions--which are directly related to the security of the population and the foreign affairs of the country--should [*581] be subjected to the influence of litigation brought by aliens.

XIII

All of these special factors notwithstanding, we cannot ignore that, as the panel dissent put it, "there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security." *Arar, 532*

F.3d at 213 (Sack, J., concurring in part and dissenting in part). Where does that leave us? We recognize our limited competence, authority, and jurisdiction to make rules or set parameters to govern the practice called rendition. By the same token, we can easily locate that competence, expertise, and responsibility elsewhere: in Congress. Congress may be content for the Executive Branch to exercise these powers without judicial check. But if Congress wishes to create a remedy for individuals like Arar, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded. Once Congress has performed this task, *then* the courts in a proper case will be able to review the statute and provide judicial oversight to the "Executive and Legislative decisions [which have been made with regard] to the conduct of foreign relations and national security."[14]

Judge SACK's dissent deems "artificial" our characterization of the new Bivens context in this case as "entirely one of 'international rendition, specifically extraordinary rendition.'" See Dissent of Judge Sack at 34. We would have thought it would be common ground that the context of this appeal is extraordinary rendition. Judge Sack, however, recon-

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[14] Dissents by their nature express views that are not the law. These dissenting opinions contain words and passages that are emotional and (in our respectful view) overwrought. Accordingly, there is no need for extended engagement. A brief survey will suffice.

ceives the context, at some points characterizing the constitutional tort as encompassing only those events that occurred within the United States while at other points requiring that the entire narrative be considered as a seamless whole, JFK to Syria. Compare id. at **34** with id. at **36-37**. But this case is emphatically and obviously about extraordinary rendition (and its alleged abuse), as is elsewhere acknowledged in the opinions of Judge Calabresi and Judge Parker. See Dissent of Judge Calabresi at **15**; Dissent of Judge Parker at **2**.

As to the extraordinary rendition context, Judge Sack (joined by all dissenters) makes the following constructive (and telling) concessions: "It is difficult to deny the existence of 'special factors counseling hesitation' in this case[,]" Dissent of Judge Sack at **47**; "It . . . may be that to the extent actions against 'policymakers' can be equated with lawsuits against policies, they may not survive Iqbal[,]" id. at **49**; and, "We share what we think to be the majority's intuition that this case would likely turn largely, if not entirely, on decisions of national security and diplomacy . . . [,]" id. at **56**.

Judge CALABRESI's dissent urges that we forgo considering whether specific factors counsel hesitation under Bivens so that we could instead remand to see whether the case might eventually be dismissed as unmanageable under the state secrets privilege--which Judge Calabresi seems equally to disapprove. See Dissent of Judge Calabresi at **13**

(state secrets privilege is the subject of "significant criticism, much of it warranted"). Thus Judge Calabresi professes hesitance to "hesitate" with respect to Bivens, as well as skepticism of the state secrets privilege. In doing so, he avoids fully endorsing either of the primary potential resolutions of this appeal, and hardly makes a choice at all. Even so, the authority cited by Judge Calabresi, which suggests deciding whether a claim is stated before doing Bivens analysis, is inapposite. Judge Calabresi fails to consider that application of the state secrets privilege is often performed witness-by-witness; question-by-question; page-by-page; paragraph-by-paragraph--and can take years. It is not judicial activism to hesitate before requiring such an exercise in circumstances in which a Bivens claim may not lie. In any event, the state secrets doctrine has roots in separation of powers principles, and is not itself devoid of constitutional implications. See *Dep't of Navy v. Egan, 484 U.S. 518, 527, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988)* ("The authority to protect [information related to national security] falls on the President as head of the Executive Branch and as Commander in Chief."); *El-Masri v. United States, 479 F.3d 296, 303 (4th Cir. 2007)* ("Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.").

Id.

[*582] CONCLUSION

For the reasons stated above, the judgment of the District Court is affirmed. The panel opinion is hereby vacated. CALABRESI, POOLER, SACK, and PARKER, Circuit Judges, dissent. Each joins fully in all the dissenting opinions, but each writes separately to emphasize particular aspects of these dissents.

Sack, Circuit Judge, joined by Judges Calabresi, Pooler, and Parker, concurring in part and dissenting in part.

The opinion of the en banc majority[1] departs from the opinion of the panel majority in two important and salutary respects.

First, the Court now explicitly acknowledges that "this is not a typical immigration case." Supra at [24]. We would prefer that the Court concede that this is not an immigration case at all -- it is about the alleged unconstitutional treatment of an alien suspected of terrorism -- but we welcome the resulting decision not to dismiss Arar's claims as jurisdictionally barred by the Immigration and Nationality Act ("INA"), see supra at [23], and not to rely, in the Court's Bivens analysis, upon the INA's remedial scheme and the well nigh unlimited executive power that the INA bestows, see supra at [31]. Compare

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[1] Judges Straub and Sotomayor voted in the en banc poll but do not participate in deciding the case en banc because Judge Straub took senior status prior to the en banc hearing and Judge Sotomayor has been elevated to the Supreme Court. Judge Katzmann recused himself from both the poll and the en banc hearing. Senior Judge McLaughlin, as a member of the original panel, has participated in the en banc consideration. Judge Calabresi participated in the en banc hearing, but has taken senior status since the argument. The author of this opinion has also taken senior status since the hearing, but was a member of the panel that heard the appeal and therefore, like Judge McLaughlin, would have been able to have participated in the en banc hearing in any event. Judge Lynch, who joined the Court since the argument, has not participated in these proceedings.

Arar v. Ashcroft, 532 F.3d 157, 169-71 & n.10, 179-81 (2d Cir. 2008) ("Arar Panel Op.").

In its second departure from the panel decision, the Court declines to hold that if, as Arar alleges, government conduct "denied [him] effective access to consular assistance, the courts, his lawyers, and family members in order to effectuate his removal to Syria," Arar's constitutional rights would not have thereby been violated. Supra at **[20]** (internal quotation marks omitted); compare *Arar Panel Op., 532 F.3d at 184-89.* We agree with this approach too. Indeed, we think both of these departures are significant enough in themselves to have rendered the unwieldy and often wasteful en banc process worthwhile here.

We disagree, however, with the majority's continued insistence that Arar cannot employ a Bivens remedy to seek compensation for his injuries at the hands of government agents. The majority reaches that conclusion by artificially dividing the complaint into a domestic claim that does [*583] not involve torture -- viz., "[Arar's] claim regarding detention in the United States," supra at **[6]** -- and a foreign claim that does -- viz., "[Arar's] claims for detention and torture in Syria," id. The majority then dismisses the domestic claim as inadequately pleaded and the foreign claim as one that cannot "be asserted under Bivens" in light of the opinion's "dominant holding" that "in the context of involuntary rendi-

tion, hesitation is warranted by special factors." Supra at [6-7].

In our view, even treating Arar's claim for mistreatment while in United States custody and denial of access to United States counsel and United States courts as, arguendo, a claim that is entirely isolated from the remainder of Arar's allegations, it was adequately pleaded in his highly detailed complaint.

As we will explain, however, the complaint's allegations cannot properly be divided into claims for mistreatment in the United States and "claims for detention and torture in Syria." Arar's complaint of mistreatment sweeps more broadly than that, encompassing a chain of events that began with his interception and detention at New York's John F. Kennedy Airport ("JFK") and continued with his being sent abroad in shackles by government agents with the knowledge that he would likely be tortured as a result. Viewed in this light, we conclude that Arar's allegations do not present a "new context" for a Bivens action.

And even were it a new context, we disagree with what appears to be the en banc majority's test for whether a new Bivens action should be made available: the existence vel non of "special factors counselling hesitation." First, we think heeding "special factors" relating to secrecy and security is a form of double counting inasmuch as those interests are

fully protected by the state-secrets privilege. Second, in our view the applicable test is not whether "special factors" exist, but whether after "paying particular heed to" them, a Bivens remedy should be recognized with respect to at least some allegations in the complaint. Applying that test, we think a Bivens remedy is available.

We hasten to add that under the proper formulation of the test, we might well agree with the en banc majority that a Bivens action is not available in the context of an alien's "claims for detention and torture in Syria." But, as we will explain, Arar's allegations are not so limited.

Our overriding concern, however, is with the majority's apparent determination to go to whatever length necessary to reach what it calls its "dominant holding": that a Bivens remedy is unavailable. Such a holding is unnecessary inasmuch as the government assures us that this case could likely be resolved quickly and expeditiously in the district court by application of the state-secrets privilege.

What is at stake on this appeal is not whether Arar will, through this litigation, obtain compensation for the injury he suffered as a result of the malfeasance of employees of the United States. In light of the many hurdles he would have to surmount,[2] he

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[2] See, e.g., *Arar Panel Op., 532 F.3d at 193* et seq. (Sack, J., concurring in part and dissenting in part) ("Arar partial panel dissent").

would be extremely unlikely to do so. Rather, the question for the Court is, and has from the outset been, the manner by which that likely result will (or will not) be reached. We fear that the majority is so bound and determined to declare categorically that there is no Bivens action in the present "context," that it unnecessarily makes dubious law.

[*584] For those reasons, we respectfully dissent.[3]

I. Arar's Allegations

The majority's recitation of the facts, see supra [8-13], is generally accurate, but anodyne. A complete assessment of the majority opinion and the implications of the Court's decision is not possible without a fuller account of the troubling allegations contained in Arar's complaint.

"Because this is an appeal from a dismissal of a complaint under *Fed. R. Civ. P. 12(b)(6)*, we view the allegations of the complaint in the light most fa-

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[3] We do not dissent from the majority's conclusions as to personal jurisdiction. The author of this opinion, as a member of the panel that originally heard this appeal, concurred in the panel opinion's conclusion that relief under the Torture Victim Protection Act is unavailable to Arar. Having reviewed the arguments to the contrary stated in Judge Pooler's partial dissent, infra, for the reasons stated in it, he now agrees that the relief under the Act is available to Arar. Inasmuch as the en banc Court now holds that it is not available, however, this opinion accepts its unavailability as a matter of law for the purposes of the Bivens analysis that follows.

vorable to appellant." *Paycom Billing Servs. v. MasterCard Int'l, Inc., 467 F.3d 283, 285 (2d Cir. 2006).* The district court's opinion carefully and fully sets forth Arar's allegations. See *Arar v. Ashcroft, 414 F. Supp. 2d 250, 252-57 (E.D.N.Y. 2006).* We adhere to that account nearly verbatim. [4]

A. Arar's Apprehension, Detention, and Forcible Transportation to Syria

Arar, who is in his thirties, is a native of Syria. He immigrated to Canada with his family when he was a teenager. He is a dual citizen of Syria and Canada. He resides in Ottawa. (*Arar, 414 F. Supp. 2d at 252.*)

In September 2002, while vacationing with his family in Tunisia, he was called back to work by his employer[5] to consult with a prospective client. He purchased a return ticket to Montreal with stops[6] in Zurich and New York. He left Tunisia on September 25, 2002. (Id.)

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[4] Citations to the district court opinion appear in parentheses. The footnotes and subheadings are ours.

[5] Arar was employed by a privately held Massachusetts-based developer and supplier of software for technical computing. See Compl. P 12.

[6] That is, changes of plane.

On September 26, 2002, Arar arrived from Switzerland at JFK to catch a connecting flight to Montreal. Upon presenting his passport to an immigration inspector, he was identified as "the subject of a . . . lookout as being a member of a known terrorist organization." Compl. Ex. D (Decision of J. Scott Blackman, Regional Director) at 2. He was interrogated by various officials for approximately eight hours.[7] The officials asked Arar if he had contacts with terrorist groups, which he categorically denied. Arar was then transported to another site at JFK, where he was placed in solitary confinement. He alleges that he was transported in chains and shackles and was left in a room with no bed and with lights on throughout the night. (*Arar, 414 F. Supp. 2d at 253.*)

The following day, starting at approximately 9:00 a.m., two FBI agents interrogated Arar for about five hours, asking him questions about Osama bin Laden, Iraq, and Palestine. Arar alleges that the agents yelled and swore at him throughout the interrogation. They ignored his repeated [*585] requests to make a telephone call and see a lawyer. At 2:00 p.m. that day, Arar was taken back to his cell, chained and shackled, and provided a cold McDonald's meal -- his first food in nearly two days. (Id.)

That evening, Arar was given an opportunity to voluntarily return to Syria, but refused, citing a

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[7] According to the complaint, on that day, Arar was questioned first by an FBI agent for five hours, Compl. P 29, then by an immigration officer for three hours, id. P 31.

fear of being tortured if returned there and insisting that he be sent to Canada or returned to Switzerland. An immigration officer told Arar that the United States had a "special interest" in his case and then asked him to sign a form, the contents of which he was not allowed to read. That evening, Arar was transferred, in chains and shackles, to the Metropolitan Detention Center ("MDC") in Brooklyn, New York,[8] where he was strip-searched and placed in solitary confinement. During his initial three days at MDC, Arar's continued requests to meet with a lawyer and make telephone calls were refused. (Id.)

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[8] This is the same federal prison in which, less than a year earlier, Javaid Iqbal was allegedly mistreated. Iqbal, a Muslim inmate accused of conspiracy to defraud the United States and fraud with identification and held post-9/11 in the MDC, allegedly suffered "unconstitutional actions against him in after separation from the general prison population." *Iqbal v. Hasty, 490 F.3d 143, 147, 148 n.1 (2d Cir. 2007)*. We held, with respect to Iqbal's subsequent Bivens action, that such treatment was not protected, as a matter of law, by the doctrine of qualified immunity. *Id. at 177-78*. The Supreme Court subsequently reversed that judgment and remanded, holding that the complaint was insufficiently pleaded as to two high-ranking official defendants. See *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1952, 173 L. Ed. 2d 868 (2009)*. On September 29, 2009, the remaining parties in Iqbal filed a document in this Court stipulating that the appeal was to be "withdrawn from active consideration before the Court . . . because a settlement has been reached in principle between Javaid Iqbal and defendant United States." Iqbal v. Hasty, No. 05-5768-cv (2d Cir. Sept. 30, 2009), "Stipulation Withdrawing Appeal from Active Consideration" dated September 29, 2009.

On October 1, 2002,[9] the Immigration and Naturalization Service ("INS") initiated removal proceedings against Arar, who was charged with being temporarily inadmissible because of his membership in al-Qaeda, a group designated by the Secretary of State as a foreign terrorist organization. Upon being given permission to make one telephone call, Arar called his mother-in-law in Ottawa, Canada. (Id.)

Upon learning of Arar's whereabouts, his family contacted the Office for Consular Affairs ("Canadian connection with his confinement under harsh conditions . . . Consulate")[10] and retained an attorney, Amal Oummih, to represent him. The Canadian Consulate had not been notified of Arar's detention. On October 3, 2002, Arar received a visit from Maureen Girvan from the Canadian Consulate, who, when presented with the document noting Arar's inadmissibility to the United States, assured Arar that removal to Syria was not an option. On October 4, 2002, Arar designated Canada as the country to which he wished to be removed. (Id.)

On October 5, 2002, Arar had his only meeting with counsel. The following day, he was taken in chains and shackles to a room where approximately seven INS officials questioned him about his reasons for opposing removal to Syria. His attorney was not provided advance notice of the interrogation, and

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[9] I.e., five days after Arar's arrival in the United States.

[10] The consulate is in New York City.

Arar further alleges that U.S. officials misled him into thinking his attorney had chosen not to attend. During the interrogation, Arar continued to express his fear of being tortured if [*586] returned to Syria. At the conclusion of the six-hour interrogation, Arar was informed that the officials were discussing his case with "Washington, D.C." Arar was asked to sign a document that appeared to be a transcript. He refused to sign the form. (*Id. at 253-54.*)

The following day, October 7, 2002, attorney Oummih received two telephone calls informing her that Arar had been taken for processing to an INS office at Varick Street in Manhattan, that he would eventually be placed in a detention facility in New Jersey, and that she should call back the following morning for Arar's exact whereabouts. However, Arar alleges that he never left the MDC and that the contents of both of these phone calls to his counsel were false and misleading. (*Id. at 254.*)

That same day, October 7, 2002, the INS Regional Director, J. Scott Blackman, determined from classified and unclassified information that Arar is "clearly and unequivocally" a member of al-Qaeda and, therefore, "clearly and unequivocally inadmissible to the United States" under *8 U.S.C. § 1182(a)(3)(B)(i)(V).* See Compl. Ex. D. at 1, 3, 5. Based on that finding, Blackman concluded "that there are reasonable grounds to believe that [Arar] is a danger to the security of the United States." Id. at

6 (brackets in original). (*Arar, 414 F. Supp. 2d at 254.*)

At approximately 4:00 a.m. on October 8, 2002, Arar learned that, based on classified information, INS regional director Blackman had ordered that Arar be sent to Syria and that his removal there was consistent with Article Three of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"). Arar pleaded for reconsideration but was told by INS officials that the agency was not governed by the "Geneva Conventions" and that Arar was barred from reentering the country for a period of five years and would be admissible only with the permission of the Attorney General. (Id.)

Later that day, Arar was taken in chains and shackles to a New Jersey airfield, where he boarded a small jet airplane bound for Washington, D.C. From there, he was flown to Amman, Jordan, arriving there on October 9, 2002. He was then handed over to Jordanian authorities, who delivered him to the Syrians later that day. At this time, U.S. officials had not informed either Canadian Consulate official Girvan or attorney Oummih that Arar had been removed to Syria. Arar alleges that Syrian officials refused to accept Arar directly from the United States. (Id.)

Arar's Final Notice of Inadmissability ("Final Notice") ordered him removed without further in-

quiry before an immigration judge. See Compl. Ex. D. According to the Final Notice: "The Commissioner of the Immigration and Naturalization Service has determined that your removal to Syria would be consistent with [CAT]." Id. (brackets in original). The Final Notice was dated October 8, 2002, and was signed by Deputy Attorney General Larry Thompson. After oral argument in the district court on the defendants' motions to dismiss, in a letter dated August 18, 2005, counsel for Arar said that Arar had received the Final Notice within hours of boarding the aircraft taking him to Jordan. (*Arar, 414 F. Supp. 2d at 254.*)

B. Arar's Detention in Syria

During his ten-month period of detention in Syria, Arar alleges, he was placed in a "grave" cell measuring six feet long, seven feet high, and three feet wide. The cell was located within the Palestine Branch of the Syrian Military Intelligence ("Palestine Branch"). The cell was damp and cold, contained very little light, and [*587] was infested with rats, which would enter the cell through a small aperture in the ceiling. Cats would urinate on Arar through the aperture, and sanitary facilities were nonexistent. Arar was allowed to bathe himself in cold water once per week. He was prohibited from exercising and was provided barely edible food. Arar lost forty pounds during his ten-month period of detention in Syria. (Id.)

During his first twelve days in Syrian detention, Arar was interrogated for eighteen hours per day and was physically and psychologically tortured. He was beaten on his palms, hips, and lower back with a two-inch-thick electric cable. His captors also used their fists to beat him on his stomach, his face, and the back of his neck. He was subjected to excruciating pain and pleaded with his captors to stop, but they would not. He was placed in a room where he could hear the screams of other detainees being tortured and was told that he, too, would be placed in a spine-breaking "chair," hung upside down in a "tire" for beatings, and subjected to electric shocks. To lessen his exposure to the torture, Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan, even though he had never been to Afghanistan and had never been involved in terrorist activity. (*Id. at 255.*)

Arar alleges that his interrogation in Syria was coordinated and planned by U.S. officials, who sent the Syrians a dossier containing specific questions. As support for this allegation, Arar notes that the interrogations in the United States and Syria contained identical questions, including a specific question about his relationship with a particular individual wanted for terrorism. In return, Arar alleges, the Syrian officials supplied U.S. officials with all information extracted from Arar; Arar cites a statement by one Syrian official who has publicly stated that the Syrian government shared information with the United States that it extracted from

him. See Compl. Ex. E (January 21, 2004 transcript of CBS's Sixty Minutes II: "His Year In Hell"). (Id.)

C. Arar's Contact with the Canadian Government While Detained in Syria

The Canadian Embassy contacted the Syrian government about Arar on October 20, 2002, and the following day, Syrian officials confirmed that they were detaining him. At this point, the Syrian officials ceased interrogating and torturing Arar. (Id.)

Canadian officials visited Arar at the Palestine Branch five times during his ten-month detention. Prior to each visit, Arar was warned not to disclose that he was being mistreated. He complied but eventually broke down during the fifth visit, telling the Canadian consular official that he was being tortured and kept in a grave. (Id.)

Five days later, Arar was brought to a Syrian investigation branch, where he was forced to sign a confession stating that he had participated in terrorist training in Afghanistan even though, Arar states, he has never been to Afghanistan or participated in any terrorist activity. Arar was then taken to an overcrowded Syrian prison, where he remained for six weeks. (Id.)

On September 28, 2003, Arar was transferred back to the Palestine Branch, where he was held for one week. During this week, he heard other detain-

ees screaming in pain and begging for their torture to end. (Id.)

On October 5, 2003, Syria, without filing any charges against Arar, released him into the custody of Canadian Embassy officials in Damascus. He was flown to Ottawa [*588] the following day and reunited with his family. (Id.)

Arar contends that he is not a member of any terrorist organization, including al-Qaeda, and has never knowingly associated himself with terrorists, terrorist organizations, or terrorist activity. Arar claims that the individual about whom he was questioned was a casual acquaintance whom Arar had last seen in October 2001. He believes that he was removed to Syria for interrogation under torture because of his casual acquaintance with this individual and others believed to be involved in terrorist activity. But Arar contends "on information and belief" that there has never been, nor is there now, any reasonable suspicion that he was involved in such activity. Compl. P 2. (*Arar, 414 F. Supp. 2d at 255-56* (footnote omitted).)

Arar alleges that he continues to suffer adverse effects from his ordeal in Syria. He claims that he has trouble relating to his wife and children, suffers from nightmares, is frequently branded a terrorist, and is having trouble finding employment due to his reputation and inability to travel in the United States. (*Id. at 256.*)

D. U.S. Policy Relating to Interrogation of Detainees by Foreign Governments

The complaint alleges on information and belief that Arar was removed to Syria under a covert U.S. policy of "extraordinary rendition," according to which individuals are sent to foreign countries to undergo methods of interrogation not permitted in the United States. The extraordinary rendition policy involves the removal of "non-U.S. citizens detained in this country and elsewhere and suspected -- reasonably or unreasonably -- of terrorist activity to countries, including Syria, where interrogations under torture are routine." Compl. P 24. Arar alleges on information and belief that the United States sends individuals "to countries like Syria precisely because those countries can and do use methods of interrogation to obtain information from detainees that would not be morally acceptable or legal in the United States and other democracies." Id. The complaint further alleges that federal officials involved with extraordinary rendition "have facilitated such human rights abuses, exchanging dossiers with intelligence officials in the countries to which non-U.S. citizens are removed." Id. The complaint also alleges that the United States involves Syria in its extraordinary rendition program to extract counter-terrorism information. (*Arar, 414 F. Supp. 2d at 256.*)

This extraordinary rendition program is, Arar alleges, not part of any official or declared U.S. public policy; nevertheless, it has received extensive attention in the press, where unnamed U.S. officials and certain foreign officials have admitted to the existence of such a policy. Arar details a number of articles in the mainstream press recounting both the incidents of this particular case and the extraordinary rendition program more broadly. These articles are attached as Exhibit C of his complaint. (*Id. at 256-57.*)

Arar alleges that the defendants directed the interrogations in Syria by providing information about Arar to Syrian officials and receiving reports on Arar's responses. Consequently, the defendants conspired with, and/or aided and abetted, Syrian officials in arbitrarily detaining, interrogating, and torturing Arar. Arar argues in the alternative that, at a minimum, the defendants knew or at least should have known that there was a substantial likelihood that he would be tortured upon his removal to Syria. (*Id. at 257.*)

E. Syria's Human Rights Record

Arar's claim that he faced a likelihood of torture in Syria is supported by U.S. State [*589] Department reports on Syria's human rights practices. See, e.g., Bureau of Democracy, Human Rights, and Labor, United States Department of State, 2004 Country Reports on Human Rights Practices (Re-

leased February 28, 2005) ("2004 Report"). According to the State Department, Syria's "human rights record remained poor, and the Government continued to commit numerous, serious abuses . . . includ[ing] the use of torture in detention, which at times resulted in death." Id. at 1. Although the Syrian constitution officially prohibits such practices, "there was credible evidence that security forces continued to use torture frequently." Id. at 2. The 2004 Report cites "numerous cases of security forces using torture on prisoners in custody." Id. Similar references throughout the 2004 Report, as well as State Department reports from prior years, are legion. See, e.g., Compl. Ex. A (2002 State Department Human Rights Report on Syria). (*Arar, 414 F. Supp. 2d at 257.*)[11]

F. The Canadian Government Inquiry

On September 18, 2006, a Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Commission"), established by the government of Canada to investigate the Arar affair, issued a three-volume report. See Arar Commission, Report of the Events Relating to Maher Arar (2006) ("Commission Report").[12] A press release

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[11] The district court's description of the facts as alleged in the complaint ends here.

[12] On October 23, 2007, this Court granted Arar's motion to take judicial notice of the Report insofar as its existence and the scope of its contents were concerned, but denied the motion insofar as it may have sought judicial notice of the facts

issued by the Commission summarized: "**On Maher Arar** the Commissioner [Dennis O'Connor] comes to one important conclusion: 'I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada.'" Arar Commission, Press Release, Arar Commission Releases Its Findings on the Handling of the Maher Arar Case (Sept. 18, 2006) (boldface in original), available at http://www.ararcommission.ca/eng/ReleaseFinal-Sept 18.pdf (copy on file with the Clerk of Court). On January 26, 2007, the Office of the Prime Minister of Canada issued the following announcement:

> Prime Minister Stephen Harper today released the letter of apology he has sent to Maher Arar and his family for any role Canadian officials may have played in what happened to Mr. Arar, Monia Mazigh and their family in 2002 and 2003.
>
> "Although the events leading up to this terrible ordeal happened under the previous government, our Government will do everything in its power to ensure that the issues raised by Commissioner O'Connor

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asserted in the report. But cf. supra at [4-5] (employing the report as the source for facts relating to Canadian involvement in the Arar incident).

are addressed," said the Prime Minister. "I sincerely hope that these actions will help Mr. Arar and his family begin a new and hopeful chapter in their lives."

Canada's New Government has accepted all 23 recommendations made in Commissioner O'Connor's first report, and has already begun acting upon them. The Government has sent letters to both the Syrian and the U.S. governments formally objecting to the treatment of Mr. Arar. Ministers Day and MacKay have also expressed Canada's concerns on this important issue to their American [*590] counterparts. Finally, Canada has removed Mr. Arar from Canadian lookout lists, and requested that the United States amend its own records accordingly.

The Prime Minister also announced that Canada's New Government has successfully completed the mediation process with Mr. Arar, fulfilling another one of Commissioner O'Connor's recommendations. This settlement, mutually agreed upon by all parties, ensures that Mr. Arar and his family will obtain fair compensation, in the amount of $ 10.5 million, plus legal costs, for the ordeal they have suffered.

Office of the Prime Minister, Press Release, Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process (Jan. 26, 2007), available at http://pm.gc.ca/eng/ media.asp?id=1509 (last visited July 15, 2009); see also Margaret L. Satterthwaite, Rendered Meaningless: Extraordinary Rendition and the Rule of Law, *75 Geo. Wash. L. Rev. 1333, 1339-40 (2007).*

II. The Dismissal of the Fourth Claim for Relief

The fulcrum of the en banc majority's analysis is its conclusion that this appeal requires us to decide whether "to devise a new Bivens damages action" under *Wilkie v. Robbins, 551 U.S. 537, 127 S. Ct. 2588, 2597, 168 L. Ed. 2d 389 (2007).* See supra at **[6]**. But the majority can characterize Arar's action as "new" only by isolating and eliminating the domestic aspects of the case. It does so in part by affirming the district court's dismissal of Arar's "Fourth Claim for Relief, (*Fifth Amendment*: Substantive Due Process -- Domestic Detention)" on the ground that the claim was insufficiently pleaded. See supra at **[19-21]**. We think that ruling to be incorrect.

With respect to the conditions of confinement aspect of this claim, the district court concluded that Arar was entitled to *Fifth Amendment* substantive due process protection and that his rights in that respect could have been violated by "the deprivations

Arar alleges with respect to his treatment while in U.S. custody." *Arar, 414 F. Supp. 2d at 286.* We agree, and the majority does not decide otherwise. Supra at [21]. With respect to the access to counsel and the courts aspect of the claim, the district court concluded that Arar would be able to state a claim for interference "with his access to courts in part by [government officials] lying to his counsel," if he could "identify 'a separate and distinct right to seek judicial relief for some wrong.'" *Arar, 414 F. Supp. 2d at 285* (quoting *Christopher v. Harbury, 536 U.S. 403, 414-15, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)).* We agree here, too, and the majority does not decide otherwise.

But the district court nonetheless dismissed the Fourth Claim for Relief without prejudice. On pain of forfeiture of the claims, it required Arar (1) with respect to the mistreatment claim, to "name those defendants that were personally involved in the alleged unconstitutional treatment," and, (2) with respect to the denial of access claim, to replead "without regard to any [underlying] rendition claim," in light of the court's conclusion that no Bivens action was available with respect to such a claim, and, because it was unclear to what underlying relief Arar was denied access, "identify[ing] the specific injury he was prevented from grieving." *Arar, 414 F. Supp.*

2d at 287-88. Arar declined to replead,[13] rendering the dismissal final.

The majority affirms the dismissal of the fourth claim partly "in view of Arar's rejection of an opportunity to re-plead." Supra at [21]. While we do not read that as a suggestion that this claim has been waived on appeal, we note that any such suggestion would be incorrect. We may review the entire judgment. See, e.g., *Kittay v. Kornstein, 230 F.3d 531, 541 n.8 (2d Cir. 2000)* ("[A] disclaimer of intent to amend the complaint renders the District Court's judgment final and allows review of the dismissal in this Court."); *Festa v. Local 3 Int'l Brotherhood of Elec. Workers, 905 F.2d 35, 36-37 (2d Cir. 1990)* (per curiam); *Conn. Nat'l Bank v. Fluor Corp., 808 F.2d 957, 960-61 (2d Cir. 1987).*

[*591]

A. Specification of Defendants' Acts and Conspiracy Allegations

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[13] Following the district court's dismissal of the fourth claim without prejudice and dismissal of the first three claims with prejudice, Arar moved for certification of a final judgment on the first three claims to enable him to appeal them immediately. See *Arar v. Ashcroft, No. CV-04-0249 (DGT), 2006 U.S. Dist. LEXIS 45550, 2006 WL 1875375 (E.D.N.Y. July 5, 2006).* The district court denied the motion. See id. Arar then declined to replead the fourth claim, apparently in order to obtain this Court's early review of the dismissal of the first three claims, cf. id.

The majority affirms the dismissal of the Fourth Claim for Relief on the ground that Arar's complaint does not "specify any culpable action taken by any single defendant" and fails to allege a conspiracy. Supra at **[21]**. We disagree with each of these rationales.

Arar should not have been required to "name those defendants [who] were personally involved in the alleged unconstitutional treatment." *Arar, 414 F. Supp. 2d at 287.* In actions pursuant to *42 U.S.C. § 1983*, which are "analog[s]" of the less-common Bivens action, *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009)* (citation omitted), we allow plaintiffs to "maintain[] supervisory personnel as defendants . . . until [they have] been afforded an opportunity through at least brief discovery to identify the subordinate officials who have personal liability." *Davis v. Kelly, 160 F.3d 917, 921 (2d Cir. 1998)* (citing Second Circuit authority).

> Similarly, courts have rejected the dismissal of suits against unnamed defendants described by roles . . . until the plaintiff has had some opportunity for discovery to learn the identities of responsible officials. Once the supervisory officer has inquired within the institution and identified the actual decision-makers of the challenged action, those officials may then submit affidavits based on their personal knowledge of the circumstances.

Id. (citations omitted). It should not be forgotten that the full name of the Bivens case itself is *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)* (emphasis added).[14]

To be sure, the Supreme Court has recently set a strict pleading standard for supervisory liability claims under Bivens against a former Attorney General of the United States and the Director of the FBI." See *Iqbal, supra.* We do not think, however, that the Court has thereby permitted governmental actors who are unnamed in a [*592] complaint automatically to escape personal civil rights liability. A plaintiff must, after all, have some way to identify a defendant who anonymously violates his civil rights. We doubt that Iqbal requires a plaintiff to obtain his abusers' business cards in order to state a civil rights claim. Put conversely, we do not think that Iqbal im-

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[14] The Supreme Court explained: "The agents were not named in petitioner's complaint, and the District Court ordered that the complaint be served upon "those federal agents who it is indicated by the records of the United States Attorney participated in the November 25, 1965, arrest of the [petitioner]." App. 3. Five agents were ultimately served." *Id. at 390 n.2*; see also Bivens, Brief for Respondent at *2 n.1, 1970 WL 116900 ("The apparent contradiction in the title of this case -- "Unknown Named" -- arises from the fact that after petitioner filed his complaint, the United States Attorney supplied the clerk of the court with the agents' names. However, as the summonses and their returns indicate, only five agents are apparently involved (App. 5-24), rather than six as stated in the case title.")

plies that federal government miscreants may avoid Bivens liability altogether through the simple expedient of wearing hoods while inflicting injury. Some manner of proceeding must be made available for the reasons we recognized in Davis.

Whether or not there is a mechanism available to identify the "Doe" defendants, moreover, Arar's complaint does sufficiently name some individual defendants who personally took part in the alleged violation of his civil rights. The role of defendant J. Scott Blackman, formerly Director of the Regional Office of INS, for example, is, as reflected in the district court's explication of the facts, see *Arar, 414 F. Supp. 2d at 252-54*, set forth in reasonable detail in the complaint.[15] So are at least some of the acts of

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[15] The complaint alleges, inter alia:

> Early on October 8, 2002, at about 4 a.m., Mr. Arar was taken in chains and shackles to a room where two INS officials told him that, based on Mr. Arar's casual acquaintance with certain named individuals, including Mr. Almalki as well as classified information, Defendant Blackman, Regional Director for the Eastern Region of Immigration and Naturalization Services, had decided to remove Mr. Arar to Syria. Without elaboration, Defendant Blackman also stipulated that Mr. Arar's removal would be consistent with Article 3 of CAT. . . . (A copy of Defendant Blackman's decision is attached as Exhibit D [to the complaint]). Compl. P 47.

the defendant Edward J. McElroy, District Director of the INS.[16]

The majority also asserts that Arar does no more than "allege[] (in passive voice) that his requests to make phone calls 'were ignored,' and that 'he was told' that he was not entitled to a lawyer." Supra at **[21]**. But as indicated above, such an identification of the unnamed defendants by their "roles" should be sufficient to enable a plaintiff to survive a motion to dismiss, and subsequently to use discovery to identify them. And while the majority is correct that the complaint does not utter the talismanic words "meeting of the minds" to invoke an agreement among the defendants, see supra at **[21]**, it is plain that the logistically complex concerted action allegedly taken to detain Arar and then transport him abroad implies an alleged agreement by government actors within the United States to act in concert.

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[16] The complaint alleges, inter alia:

> The only notice given [Arar's counsel prior to his interrogation late on the evening of Sunday, October 6, 2002] was a message left by Defendant McElroy, District Director for Immigration and Naturalization Services for New York City, on [counsel's] voice mail at work that same [Sunday] evening. [She] did not retrieve the message until she arrived at work the next day, Monday morning, October 7, 2002 -- long after Mr. Arar's interrogation had ended. Compl. P 43.

C. Dismissal of Claims of Denial of Access to Courts and Counsel

With respect to the dismissal of Arar's claim for "interfere[nce] with his access to lawyers and the courts" while he was incarcerated by United States officials, Compl. P 93, we think the district court erred here, too. An access to courts claim requires the pleading of (1) a "nonfrivolous, arguable underlying claim" that has been frustrated by the defendants' actions, and (2) a continued inability to obtain the relief sought by the underlying claim. *Christopher, 536 U.S. at 415-16* (internal quotation marks omitted). The district court decided that Arar failed [*593] to plead with sufficient "precis[ion]" the existence of a sought-for underlying claim for relief, *Arar, 414 F. Supp. 2d at 286*, which means it decided that, for purposes of *Federal Rule of Civil Procedure 8*,[17] the defendants were not put on notice of the exis-

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[17] That rule provides:

> Claim for Relief. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
>
> *Fed. R. Civ. P. 8(a).*

tence of such a claim. See *Christopher, 536 U.S. at 416* ("Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations . . . sufficient to give fair notice to a defendant.").

But taking the allegations in the complaint as true, as we must, the complaint clearly implies the existence of an underlying claim for relief under CAT. The defendants can hardly argue that under Arar's assertions, which we take to be true, they lacked notice of such a claim, since the complaint says that it was they who first notified Arar about it: Arar alleges that on October 8, 2002, "two INS officials told him that . . . Defendant Blackman . . . had decided to remove [him] to Syria," and "Defendant Blackman also stipulated that [such action] would be consistent with Article 3 of CAT." Compl. P 47. Indeed, the complaint alleges that Arar asked defendants for reconsideration of that decision -- i.e., relief from it -- in light of the prospect of torture in Syria, but the officials said that "the INS is not governed by the 'Geneva Conventions.'"

Id.

Insofar as the district court's requirement that Arar "articulate more precisely the judicial relief he was denied," *Arar, 414 F. Supp. 2d at 286*, related to its holding that "Bivens did not extend a remedy to Arar for his deportation to Syria," id., we disagree for the reasons set forth below. Insofar as the district

court thought Arar's underlying CAT claim would have been frivolous, it was mistaken. Cf. *Ramsameachire v. Ashcroft, 357 F.3d 169, 184 (2d Cir. 2004)* (pursuant to the CAT, the United States may not remove an alien to a country if "'it is more likely than not that he or she would be tortured if removed to [that country]'" (quoting *8 C.F.R. § 208.16(c)(2)*)).

Nor was CAT the only relief Arar was denied. As the government pointed out at oral argument, "th[e] decision [in *Michael v. INS, 48 F.3d 657 (2d Cir. 1995)*,] shows that in extraordinary cases, and no one can dispute that this is an extraordinary case, the plaintiff could have filed a habeas [petition] and sought a stay pursuant to the All Writs Act." Tr. at 82 (Cohn).[18]

Contrary to the district court's ruling, then, Arar's complaint put the defendants on notice of claims seeking relief to bar his removal that were frustrated by the defendants' actions. Whatever the ultimate merits of those claims, they would not have been "frivolous." And absent a remedy for the rendition and torture themselves -- the district court, and the majority, of [*594] course, conclude there is none -- no contemporaneous legal relief is now possible

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[18] In response to a question by the Chief Judge as to what cognizable allegations might be made in such a habeas petition, the government said, "Your Honor, I'm not going to speak for what a judge might or might not have said, but in his habeas position and his petition for a stay he could say, look, things are moving quickly, I'm afraid they're going to send me to Syria, don't let that happen." Tr. 84; see also id. at 85.

except through the access to courts and counsel claim. See generally Br. of Amici Norman Dorsen et al. at 12-14. The Fourth Claim for Relief therefore states a sufficient due process access claim.

D. Sufficient Pleading under Iqbal

More generally, we think the district court's extended recitation of the allegations in the complaint makes clear that the facts of Arar's mistreatment while within the United States -- including the alleged denial of his access to courts and counsel and his alleged mistreatment while in federal detention in the United States -- were pleaded meticulously and in copious detail. The assertion of relevant places, times, and events -- and names when known -- is lengthy and specific. Even measured in light of Supreme Court case law post-dating the district court's dismissal of the fourth claim, which instituted a more stringent standard of review for pleadings, the complaint here passes muster. It does not "offer[] 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Iqbal, 129 S. Ct. at 1949* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).* Nor does it "tender[] 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting *Twombly, 550 U.S. at 557*). Its allegations of a constitutional violation are "'plausible on [their] face.'" Id. (quoting *Twombly, 550 U.S. at 555*). And, as we have explained, Arar has pled "factual content that allows the court to draw the reasonable inference

that the defendant[s] [are] liable for the misconduct alleged." Id. (quoting *Twombly, 550 U.S. at 556*). We would therefore vacate the district court's dismissal of the Fourth Claim for Relief.

III. The Majority's Interpretation of the Second and Third Claims for Relief

Having thus decided, mistakenly we think, that Arar's Fourth Claim for Relief has failed, our colleagues leap to the conclusion that what remains -- the allegations contained in what Arar's complaint styles as the Second and Third Claims for Relief -- relates only to the legal implications of the international and foreign elements of the defendants' behavior. See supra at **[21]** ("Arar's remaining claims seek relief on the basis of torture and detention in Syria . . . ."). Even were we to agree with the majority's view that the Fourth Claim for Relief warranted dismissal, we would still not concur in its crabbed interpretation of Arar's complaint in light of the facts alleged in it.

"[W]e may not affirm the dismissal of [a] complaint because [it has] proceeded under the wrong theory 'so long as [it has] alleged facts sufficient to support a meritorious legal claim.'" *Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 89 (2d Cir. 2000)* (plurality opinion of Pooler, J.) (quoting *Northrop v. Hoffman of Simsbury, Inc., 134 F.3d 41, 46 (2d Cir. 1997))*, cert. denied, *534 U.S. 888, 122 S. Ct. 201, 151 L. Ed. 2d 142 (2001)*. "'Factual allegations

alone are what matter[].'" *Northrop, 134 F.3d at 46* (quoting *Albert v. Carovano, 851 F.2d 561, 571 n.3 (2d Cir. 1988)* (en banc)); see also *Newman v. Silver, 713 F.2d 14, 15 n.1 (2d Cir. 1983)* ("[T]he nature of federal pleading . . . is by statement of claim, not by legal theories.").[19] [*595] And we are required to read those factual allegations as a whole. See *Shapiro v. Cantor, 123 F.3d 717, 721 (2d Cir. 1997)*; see also *Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1252 n.11 (11th Cir. 2005)* (per curiam), cert. denied, *549 U.S. 1032, 127 S. Ct. 596, 166 L. Ed. 2d 431 (2006)*; *Goldwasser v. Ameritech Corp., 222 F.3d 390, 401 (7th Cir. 2000)*.

Although Arar pled in his Fourth Claim for Relief what he denominated as a separate "Claim" on the subject of "Domestic Detention," including allegations about unconstitutional conditions of confinement and denial of access to courts and counsel, the complaint as a whole makes broader allegations of mistreatment while within the borders of the United States. According to the complaint: (1) Arar was apprehended by government agents as he sought to

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[19] The Federal Rules of Civil Procedure instruct that "[p]leadings must be construed so as to do justice." *Fed. R. Civ. P. 8(e)*. Wright and Miller's treatise counsels that "[t]his provision is not simply a precatory statement but reflects one of the basic philosophies of practice under the federal rules." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1286 (3d ed. 2004). "One of the most important objectives of the federal rules is that lawsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleadings have been artfully drawn." Id.

change planes at JFK; (2) he was not seeking to enter the United States; (3) his detention was for the purpose of obtaining information from him about terrorism and his alleged links with terrorists and terrorist organizations; (4) he was interrogated harshly on that topic -- mostly by FBI agents -- for many hours over a period of two days; (5) during that period, he was held incommunicado and was mistreated by, among other things, being deprived of food and water for a substantial portion of his time in custody; (6) he was then taken from JFK to the MDC in Brooklyn, where he continued to be held incommunicado and in solitary confinement for another three days; (7) while at the MDC, INS agents sought unsuccessfully to have him agree to be removed to Syria because they and other U.S. government agents intended that he would be questioned there along similar lines, but under torture; (8) U.S. officials thwarted his ability to consult with counsel or access the courts; and (9) thirteen days after Arar had been intercepted and incarcerated at the airport, defendants sent him against his will to Syria, where they allegedly intended that he be questioned under torture and while enduring brutal and inhumane conditions of captivity. This was, as alleged, all part of a single course of action conceived of and executed by the defendants in the United States in order to try to make Arar "talk."

It may not have been best for Arar to file a complaint that structures his claims for relief so as to charge knowing or reckless subjection to torture,

coercive interrogation, and arbitrary detention in Syria (the second and third claims) separately from charges of cruel and inhuman conditions of confinement and "interfere[nce] with access to lawyers and the courts" while in the United States (the fourth claim). But such division of theories is of no legal consequence. "'Factual allegations alone are what matter[].'" *Northrop, 134 F.3d at 46* (quoting *Albert, 851 F.2d at 571 n.3*). The assessment of Arar's complaint must, then, take into account the entire arc of factual allegations that it contains -- his interception and arrest; his interrogation, principally by FBI agents, about his putative ties to terrorists; his detention and mistreatment at JFK in Queens and the MDC in Brooklyn; the deliberate misleading of both his lawyer and the Canadian Consulate; and his transport to Washington, D.C. and forced transfer to Syrian authorities for further detention and questioning under torture. Such attention to the complaint's factual [*596] allegations, rather than its legal theories, makes perfectly clear that the remaining claims upon which Arar seeks relief are not limited to his "detention or torture in Syria," supra at [6], but include allegations of violations of his due process rights in the United States. The scope of those claims is relevant in analyzing whether a Bivens remedy is available.

IV. The "Context" in Which a Bivens Remedy Is Sought

The majority's artificial interpretation of the complaint permits it to characterize the "context" of Arar's Bivens action as entirely one of "international rendition, specifically, 'extraordinary rendition.'" Supra at **[32]**; see also id. ("Extraordinary rendition is treated as a distinct phenomenon in international law."). This permits the majority to focus on the part of the complaint that presents a "new context" for Bivens purposes. But when the complaint is considered in light of all of Arar's allegations, his due process claim for relief from his apprehension, detention, interrogation, and denial of access to counsel and courts in the United States, as well as his expulsion to Syria for further interrogation likely under torture, is not at all "new."

A. Bivens and Its Progeny

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)*. Bivens permitted "a victim of a *Fourth Amendment* violation by federal officers [to] bring suit for money damages against the officers in federal court." Id. The Supreme Court has

been reluctant, as the majority correctly observes, to "extend" Bivens liability further. See, e.g., *Wilkie, 127 S. Ct. at 2597*. The Court has done so only twice -- in the contexts of "an implied damages remedy under the *Due Process Clause of the Fifth Amendment*" in *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*, and under "the *Cruel and Unusual Punishments Clause of the Eighth Amendment*" in *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). Malesko, 534 U.S. at 67*; see also *Wilkie, 127 S. Ct. at 2597-98*. But we must ask whether we should "devise a new Bivens damages action," *Wilkie, 127 S. Ct. at 2597*, only if the asserted action is, indeed, new. And a new Bivens action is not being sought unless the plaintiff is asking the court to "extend Bivens liability to a[] new context or new category of defendants." *Malesko, 534 U.S. at 68*.

B. The New Category of Defendants Test

The majority does not suggest that Arar's Bivens claim fails because it is against a new category of defendants. The Bivens remedy was devised to supply relief for constitutional torts by federal agents and officials. See *Malesko, 534 U.S. at 70*.

C. The New Context Test

The questions, then, are whether we are facing a "new context," or considering recognizing "a new Bivens damages action," questions that are complicated by the fact that the meaning that the Supreme

Court has ascribed to those terms is less than clear. Compare *Malesko, 534 U.S. at 67* (noting that Bivens was extended to "a new right of action" in Davis v. Passman, in which the Court "recognized an implied damages remedy under the *Due Process Clause of the Fifth Amendment*" (emphasis added)), [*597] with *id. at 68* (describing *Schweiker v. Chilicky, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*, as presenting a "new context[]" in which the plaintiffs sought damages under the *Due Process Clause* for errors made by federal officials "in the[] handling of [their] Social Security applications" (emphasis added)).

If the alleged facts of Arar's complaint were limited to his claim of "extraordinary rendition" to, and torture in, Syria -- that is, limited to his allegations that he was transported by the United States government to Syria via Jordan pursuant to a conspiracy or other arrangement among the countries or their agents and mistreated in Syria as a result -- as the majority would have it, then we might well agree that we are dealing with a "new context." But, as we have explained, the complaint is not so limited. Incarceration in the United States without cause, mistreatment while so incarcerated, denial of access to counsel and the courts while so incarcerated, and the facilitation of torture by others, considered as possible violations of a plaintiff's procedural and substantive due process rights, are hardly novel claims, nor

do they present us with a "new context" in any legally significant sense.[20]

We have recognized implied Bivens rights of action pursuant to the *Due Process Clause*, so Arar's claims for relief are not new actions under Bivens in that sense. A deprivation of procedural due process rights can give rise to a Bivens claim under our case law. See, e.g., *Tellier v. Fields, 280 F.3d 69, 80-83 (2d Cir. 2000)*. And while we do not appear to have squarely considered whether a Bivens action may lie for alleged violations of substantive due process rights, our cases imply that it can be. In *Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007)*, rev'd in part on

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[20] In one sense, every case presents a new context, in that it presents a new set of facts to which we are expected to apply established law. But a new set of facts is not ipso facto a "new context." We do not decide, based on the difference in factual setting alone, whether or not it is a good idea to allow a plaintiff to avail him or herself of a well-established remedy such as that afforded by Bivens. This is illustrated by cases involving legal contexts where Bivens is well-established, in which courts do not conduct a fresh assessment as to whether a Bivens action is available based on the facts of each case. See, e.g., *Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004)* (Bivens action for *Fourth Amendment* violation); *McCarthy v. Madigan, 503 U.S. 140, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992)* (Bivens action for *Eighth Amendment* violation), superseded by statute on other grounds as stated in *Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001)*; *Castro v. United States, 34 F.3d 106 (2d Cir. 1994)* (*Fourth Amendment*); *Armstrong v. Sears, 33 F.3d 182 (2d Cir. 1994)* (same); *Anderson v. Branen, 17 F.3d 552 (2d Cir. 1994)* (same); see also *Hallock v. Bonner, 387 F.3d 147 (2d Cir. 2004)* (same), rev'd on other grounds, sub nom *Will v. Hallock, 546 U.S. 345, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)*.

other grounds sub nom *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, for example, we considered a Bivens action brought on, inter alia, a *Fifth Amendment* substantive due process theory. The plaintiff alleged physical mistreatment and humiliation, as a Muslim prisoner, by federal prison officials, while he was detained at the MDC. After concluding, on interlocutory appeal, that the defendants were not entitled to qualified immunity, we returned the matter to the district court for further proceedings. We did not so much as hint either that a Bivens remedy was unavailable or that its availability would constitute an unwarranted extension of the Bivens doctrine.[21] *Iqbal, 490 F.3d at 177-78.*

[*598] In other cases we have apparently assumed Bivens remedies were available for substantive due process claims. See *Thomas v. Ashcroft, 470 F.3d 491, 497 (2d Cir. 2006)* (reversing district court's dismissal of Bivens action for violation of plaintiff's *Fifth Amendment* substantive due process rights while detained at the MDC); *Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000)* (dismissing, on

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[21] Shortly after we decided Iqbal, the Supreme Court made clear that by appealing from the district court's denial of qualified immunity, the defendants placed within our jurisdiction the question of "the recognition of the entire cause of action." *Wilkie, 127 S. Ct. at 2597 n.4.* The district court in Iqbal had specifically rejected the defendants' argument that a Bivens action was unavailable. *See Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 U.S. Dist. LEXIS 21434, at *44-*45, 2005 WL 2375202, at *14 (E.D.N.Y. Sept. 27, 2005).* Thus, had we thought that no Bivens action was available, we had the power to resolve Iqbal's claims on that basis.

qualified immunity grounds, plaintiff's Bivens claim for, inter alia, substantive due process violations, without questioning whether a cause of action was available); *Li v. Canarozzi, 142 F.3d 83 (2d Cir. 1998)* (affirming judgment following jury verdict for defendants in Bivens action based on allegations of physical assault by guards at the federal Metropolitan Correctional Center in New York City, although not explicitly on substantive due process grounds); *Ayeni v. Mottola, 35 F.3d 680, 691 (2d Cir. 1994)* (apparently assuming that Bivens remedy was available for substantive due process claim, but deciding that it could not be pursued because the claim in issue was covered by the more particular provisions of the *Fourth Amendment*, for which a Bivens action was permitted), abrogated on qualified immunity grounds, *Wilson v. Layne, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)*.

Indeed, even the most "international" of Arar's domestic allegations -- that the defendants, acting within the United States, sent Arar to Syria with the intent that he be tortured -- present no new context for Bivens purposes. Principles of substantive due process apply to a narrow band of extreme misbehavior by government agents acting under color of law: mistreatment that is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lombardi v. Whitman, 485 F.3d 73, 79 (2d Cir. 2007)* (internal quotation marks omitted). Sending Arar from the United States with the intent or understanding that he will be tortured in Syria

easily exceeds the level of outrageousness needed to make out a substantive due process claim.

Although the "shocks the conscience" test is undeniably "vague," see *Estate of Smith v. Marasco, 430 F.3d 140, 156 (3d Cir. 2005)*; *Schaefer v. Goch, 153 F.3d 793, 798 (7th Cir. 1998)*, "[n]o one doubts that under Supreme Court precedent, interrogation by torture" meets that test, *Harbury v. Deutch, 233 F.3d 596, 602, 344 U.S. App. D.C. 68 (D.C. Cir. 2000)*, rev'd on other grounds sub nom *Christopher v. Harbury, 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)*;[22] see also *Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952)* (holding that the forcible pumping of a suspect's stomach to obtain evidence to be used against him was "too close to the rack and the screw to permit of constitutional differentiation"); *Palko v. Connecticut, 302 U.S. 319, 326, 58 S. Ct. 149, 82 L. Ed. 288 (1937)* (noting that the *Due Process Clause* must at least "give protection against torture, physical or mental"), overruled [*599] on other grounds, *Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)*; *Brown v. Mississippi, 297 U.S. 278, 285-86, 56 S. Ct. 461, 80 L. Ed. 682 (1936)* ("Because a state may dispense with a jury trial, it does not follow

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[22] The D.C. Circuit in Harbury concluded that the interrogation in question did not violate the Constitution because it occurred entirely abroad. See *Harbury, 233 F.3d at 602-04* (relying upon *United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)*).

that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.").[23]

To be sure, Arar alleges not that the defendants themselves tortured him; he says that they "outsourced" it.[24] But we do not think that the question whether the defendants violated Arar's substantive due process rights turns on whom they selected to do the torturing,[25] or that such "outsourcing"

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[23] The full quotation is:

> [T]he freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.

Brown, 297 U.S. at 285-86.

[24] "[R]endition -- the market approach -- outsources our crimes, which puts us at the mercy of anyone who can expose us, makes us dependent on some of the world's most unsavory actors, and abandons accountability. It is an approach we associate with crime families, not with great nations." Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century 388 (2008). "[O]ne could get the worst of both worlds: national responsibility for acts as to which the agents we have empowered are unaccountable." Id. at 387.

[25] "I do not think that whether the defendants violated Arar's *Fifth Amendment* rights turns on whom they selected to do the torturing: themselves, a Syrian Intelligence officer, a

somehow changes the essential character of the acts within the United States to which Arar seeks to hold the defendants accountable.

We think that Arar states a substantive due process claim under either of two theories of substantive due process liability: "special relationship liability" or "state-created-danger liability," *Benzman v. Whitman, 523 F.3d 119, 127 (2d Cir. 2008)* (internal quotation marks omitted). Under the latter doctrine, the defendants can be held liable for "tak[ing] an affirmative act that creates an opportunity for a third party to harm a victim (or increases the risk of such harm)." *Lombardi, 485 F.3d at 80.* Under the former, Arar was owed "an affirmative duty" by the defendants to protect him from harm by Syrian agents in light of the fact that the government took him "into its custody and h[eld] him there against his will." *Matican v. City of New York, 524 F.3d 151, 155-56 (2d Cir.)* (citations, internal quotation marks, and footnotes omitted), cert. denied, *129 S. Ct. 636, 172 L. Ed. 2d 611 (2008).*

In sum, we do not view the current action as presenting a "new context" in any relevant sense. We therefore do not think we must decide whether "to devise a new Bivens damages action." *Wilkie, 127 S. Ct. at 2597*, here.

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warlord in Somalia, a drug cartel in Colombia, a military contractor in Baghdad or Boston, a Mafia family in New Jersey, or a Crip set in South Los Angeles." Arar partial panel dissent at 205.

V. Devising a New Bivens Damages Action

Even apart from our disagreement with the majority that Arar's claims present a new context in which to extend Bivens liability, we are puzzled by the majority's analysis as to whether to do so. Having decided that the issue for our consideration is whether a Bivens action should be [*600] permitted in what it has concluded is a new context, the majority engages in a two-part inquiry: "whether there is an alternative remedial scheme available to the plaintiff; and whether 'special factors counsel[] hesitation' in creating a Bivens remedy." Supra at **[33]** (quoting *Wilkie, 127 S. Ct. at 2598*).

Our colleagues wisely decline to decide the first issue, whether an alternative remedial scheme is available, partly because they conclude that this is not an immigration case (or, at least, not a "typical" one), see supra at **[28]**, and partly because "Arar has alleged that he was actively prevented from seeking any meaningful review and relief through the INA processes," supra at **[35]**; see also supra at **[27]**. This is significant inasmuch as the Supreme Court has observed that it has recognized "new" Bivens actions precisely, inter alia, "to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct." *Malesko, 534 U.S. at 70* (emphasis omitted).

The majority moves on to the second prong of the test, concluding that "special factors are clearly present in the new context of this case, and they sternly counsel hesitation." Supra at **[35-36]**. We think it unfortunate that the majority concludes that Arar should be afforded no Bivens right of action in light of such "special factors." We quarrel not only with their conclusion, but also the majority's apparent treatment of the existence vel non of "special factors counseling hesitation" as the determinative legal standard for whether an extension of Bivens is warranted. Setting aside for the moment our view that many of the "special factors" cited by the majority are not properly considered to be such, we think it mistaken to preclude Bivens relief solely in light of a citation or compilation of one or more purported examples of such "special factors."

A. "Special Factors" As a Standard

The majority is not altogether clear in conveying its understanding of the legal significance of a finding that "special factors counseling hesitation," "sternly" or otherwise, are present. The majority acknowledges that "[h]esitation is a pause, not a full stop, or an abstention; and to counsel is not to require," supra at **[37]**, but it also states that countervailing factors are not considered, and that no such factors have "ever been cited by the Supreme Court as a reason for affording a Bivens remedy where it would not otherwise exist," id. What we are left with is an implication that the presence of "spe-

cial factors counseling hesitation" in fact does require a "full stop, or an abstention." We disagree. It seems to us that the existence of such "special factors" alone does not compel a conclusion that a Bivens action is unavailable.

When the words "special factors counseling hesitation" were first uttered by the Supreme Court, in Bivens itself, the Court asserted that there is a general rule "that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens, 403 U.S. at 396* (internal quotation marks omitted). The Court then said: "The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress," citing cases in which the general rule had not been applied.[26] Id. The Bivens Court's [*601] observation that there was no cause for hesitation, and its simultaneous recognition in the case before it of a private right of action did not imply, however -- as the majority seems to -- that if there had been reason to

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[26] The Court referred by way of example to its previous decisions in *United States v. Standard Oil Co., 332 U.S. 301, 311, 67 S. Ct. 1604, 91 L. Ed. 2067 (1947)*, in which it had concluded that the government had no implied right of action against a company that had allegedly injured a soldier because it trenched upon "federal fiscal policy" particularly delegated to Congress, and *Wheeldin v. Wheeler, 373 U.S. 647, 83 S. Ct. 1441, 10 L. Ed. 2d 605 (1963)*, in which the Court found no private right of action under federal law where the defendant's acts were not asserted to violate the plaintiff's constitutional rights and were governed by state law

hesitate, then the Court, ipso facto, would not have recognized a right of action.[27]

The Supreme Court has not told us that "special factors counseling hesitation" are to be understood to prohibit a private right of action. In Wilkie, for example, the Court noted that deciding "whether to recognize a Bivens remedy may require two steps," the second of which asks that the court "pay[] particular heed . . . to any special factors counselling hesitation," id., *127 S. Ct. at 2598* (emphasis added). And the Court, in *Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)*, relied upon by the Wilkie Court in this regard, similarly observed that "[i]n the absence of . . . a congressional directive [that a right of action lies], the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id. at 378* (emphasis added).

"[H]eed" means "[c]lose attention" or "notice." American Heritage Dictionary of the English Language 813 (4th ed. 2000). To "pay heed," then, means "to notice," it does not mean "to be governed by."

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[27] This appears to reflect a classic logical fallacy, "denial of the antecedent," which mistakes a necessary condition for a sufficient one. E.M. Adams, The Fundamentals of General Logic 164 ("The truth of the premises does not require the truth of the conclusion. This means that denying the antecedent is an invalid form of the simple conditional argument.").

The majority tells us that "'[h]esitation' is 'counseled' whenever thoughtful discretion would pause even to consider." Supra at [37]. If the existence of "special factors counseling hesitation" were determinative of the existence of a right of action, the bar to declining to allow a new Bivens claim would be less than "remarkably low." Id. It would be chimerical.

It is difficult to deny the existence of "special factors counseling hesitation" in this case. We have been "hesitating" -- in order to deliberate in light of those factors -- for nearly two years. While the time we have taken to consider "special factors" strongly indicates that they counsel hesitation, it cannot follow that having hesitated, we must therefore halt, and dismiss the Bivens complaint.[28]

B. The Special Factors Identified by the Majority

The "special factors" cited by the majority fall into one of two general categories: those involving security, secrecy, and confidentiality, [*602] and

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[28] Such a test would be reminiscent of Leo Tolstoy's brother's perhaps apocryphal challenge to Tolstoy to stand in a corner and not think of a white bear. See, e.g., Aylmer Maude, The Life of Tolstoy: First Fifty Years (Dodd, Mead and Co. 1910) 19 ("[T]here was also a certain Fanfaronof Hill, up which [my brother] said he could lead us, if only we would fulfil all the appointed conditions. These were: first, to stand in a corner and not think of a white bear. I remember how I used to get into a corner and try (but could not possibly manage) not to think of a white bear.").

those involving other policy considerations. We turn to the latter category first, briefly summarizing each factor as the majority describes it and then setting forth our view of the factor's weight.

1. Factors not involving secrecy or security. This action asks for damages, but it functionally "operates as a constitutional challenge to the policies promulgated by the executive." Supra at [38]. We should hesitate to allow such an action to proceed because to do so would tacitly "decide," id., that Bivens can subject federal officers to the kind of enterprise liability that was established for actions under *42 U.S.C. § 1983* by *Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*, but has not been established for Bivens actions.

This paraphrase sets forth the strongest argument ("factor"), we think, for denying a Bivens remedy to Arar. After Iqbal, it would be difficult to argue that Arar's complaint can survive as against defendants who are alleged to have been supervisors with, at most, "knowledge" of Arar's mistreatment. See *Iqbal, 129 S. Ct. at 1949*; see also *id. at 1955* (Souter, J., dissenting). And to the extent that the United States remains a defendant, perhaps it should be dismissed for want of possible liability under Bivens too. But that does not dispose of the case against the lower-level defendants, such as Blackman, McElroy, and the Doe defendants, who are al-

leged to have personally undertaken purposeful unconstitutional actions against Arar.

It also may be that to the extent actions against "policymakers" can be equated with lawsuits against policies, they may not survive Iqbal either. But while those championing Arar's case may in fact wish to challenge extraordinary rendition policy writ large, the relief Arar himself seeks is principally compensation for an unconstitutional implementation of that policy. That is what Bivens actions are for.

> Actions for damages against federal officers "who implement" rendition "policy" implicate sovereign immunity concerns, by "influenc[ing] government policy, prob[ing] government secrets, invad[ing] government interests, enmesh[ing] government lawyers, and . . . elicit[ing] government funds for settlement." Supra at [39].
>
> Recognizing a Bivens action for Arar would entail a judicial "assessment of the validity and rationale" of rendition, which "directly affect[s] significant diplomatic and national security concerns." Supra at [40]. The concern here is in part one of separation of powers, see supra at [41], and in part one of institutional incompetence, see supra at [41].

Aside from diplomatic and national security considerations, which we address below, this consideration applies to all civil rights actions. Bivens by its nature implicates "government interests," enmeshes government lawyers, and elicits government funds for settlement. Bivens by its nature authorizes courts to invalidate exercises in executive power. A Bivens action, like any other civil rights action, is an attempt to hold members of the executive accountable for their allegedly unconstitutional acts, through the courts. If these "special factors" were persuasive grounds on which to deny Bivens actions, they would not only not be permitted in new contexts, they would not be permitted at all.

Similarly, insofar as this Bivens action may influence executive policy, we doubt [*603] that that should be a factor "counseling hesitation" either. Civil rights actions influence policy: They make it more costly for executive officers to violate the Constitution. That is their point. See *Wyatt v. Cole, 504 U.S. 158, 161, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992)* ("The purpose of *§ 1983* is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.").

Finally, the majority suggests that "[i]n the small number of contexts in which courts have implied a Bivens remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which

officers should have pursued," a "distinction [the majority says] may or may not amount to a special factor counseling hesitation in the implication of a Bivens remedy." Supra at **[54]**. It should be noted to the contrary that in the two Supreme Court decisions that did "extend" a Bivens remedy in a "new context," such identification was anything but "easy." *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*, involved the line between constitutional and unconstitutional medical treatment and medical facilities in prisons, whose management the Supreme Court has found "peculiarly within the province and professional expertise of corrections officials" -- and thus outside of the competence of judges -- and instructed courts to "ordinarily defer to [prison officials'] expert judgment," *Pell v. Procunier, 417 U.S. 817, 827, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974)*. And *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*, addressed the line between constitutional and unconstitutional discrimination in public employment, which the Court later observed raises issues requiring "decisions [that] are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify," *Engquist v. Or. Dep't of Agric., 128 S.Ct. 2146, 2154, 170 L. Ed. 2d 975 (2008)*.

The factors relied upon by the majority that do not relate to secrecy or security therefore do not appear to us to counsel strongly against recognition of a Bivens remedy here.

2. Factors involving secrecy or security. The other "special factors" cited by the majority focus our attention on the ability of the executive to conduct the business of diplomacy and government in secret as necessary and to protect public and private security. It is beyond dispute that the judiciary must protect that concern. See, e.g., *Doe v. CIA, 576 F.3d 95 (2d Cir. 2009)*. But inasmuch as there are established procedures for doing just that, we think treating that need as giving rise to "special factors counseling hesitation" is an unfortunate form of double counting. The problem can be, should be, and customarily is, dealt with case by case by employing the established procedures of the state-secrets doctrine, see id.; see also section VI, below, rather than by barring all such plaintiffs at the courtroom door without further inquiry.

C. Factors Weighing in Favor of a Bivens Action

At least some factors weigh in favor of permitting a Bivens action in this case. We assume, as we are required to, that Arar suffered a grievous infringement of his constitutional rights by one or more of the defendants, from his interception and detention while changing planes at an international airport to the time two weeks [*604] later when he was sent off in the expectation -- perhaps the intent and expectation -- that he would be tortured, all in order to obtain information from him. Breach of a constitutional or legal duty would appear to counsel

in favor of some sort of opportunity for the victim to obtain a remedy for it. Justice Harlan's landmark concurrence in Bivens explains:

> The [government's] arguments for a more stringent test to govern the grant of damages in constitutional cases [than that governing a grant of equitable relief] seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests . . . . To be sure, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." But it must also be recognized that the *Bill of Rights* is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to [the plaintiff's constitutional] legal interests than with respect to interests protected by federal statutes.

Bivens, 403 U.S. at 407 (Harlan, J., concurring) (citation and footnote omitted).

And more generally, Bivens should be available to vindicate *Fifth Amendment* substantive due process rights such as those asserted here. As Judge Posner wrote for the Seventh Circuit with respect to a Bivens action:

> [I]f ever there were a strong case for "substantive due process," it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody. If the wanton or malicious infliction of severe pain or suffering upon a person being arrested violates the *Fourth Amendment* -- as no one doubts -- and if the wanton or malicious infliction of severe pain or suffering upon a prison inmate violates the *Eighth Amendment* -- as no one doubts -- it would be surprising if the wanton or malicious infliction of severe pain or suffering upon a person confined following his arrest but not yet charged or convicted were thought consistent with due process.

Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989), cert. denied, *493 U.S. 1026, 110 S. Ct. 733, 107 L. Ed. 2d 752 (1990)*; [29] accord *Magluta v. Samples, 375*

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[29] Although there is some disagreement in the Circuits regarding precisely when, following arrest, abuse of detained persons is to be analyzed under principles of substantive due process, we think Judge Posner's comment as to why those principles must apply at some point is insightful and remains

F.3d 1269 (11th Cir. 2004) (reversing district court's dismissal of pretrial detainee's Bivens action alleging unconstitutional conditions of confinement at federal penitentiary in violation of the *Due Process Clause of the Fifth Amendment*); *Cale v. Johnson, 861 F.2d 943, 946-47 (6th Cir. 1988)* (concluding that "federal courts have the jurisdictional authority to entertain a Bivens action brought by a federal prisoner, alleging violations of his right to substantive due process"), abrogated on other grounds, *Thaddeus-X v. Blatter, 175 F.3d 378, 387-88 (6th Cir. 1999)*; see also *Sell v. United States, 539 U.S. 166, 193, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003)* (Scalia, J., dissenting) (observing that "a [Bivens] action . . . is available to federal pretrial detainees challenging the conditions of their confinement" [*605] (citing *Lyons v. U.S. Marshals, 840 F.2d 202 (3d Cir. 1988)*).[30]

A federal inmate serving a prison sentence can employ Bivens to seek damages resulting from mistreatment by prison officials. *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*. It would be odd if a federal detainee not charged with

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valid.

[30] While cases permitting pretrial detainees to bring Bivens actions for violations of their substantive due process rights support the availability of a Bivens action here, Arar's substantive due process claim should not be evaluated under the standard for assessing the claims of persons who, unlike Arar, were detained pretrial rather than for the purpose of interrogation.

or convicted of any offense could not bring an analogous claim.[31]

Finally, a factor counseling recognition of a Bivens action is that Arar has no other remedy for the alleged harms the defendant officers inflicted on him. Cf. *Malesko, 534 U.S. at 70* ("In 30 years of Bivens jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct.").

VI. The State-Secrets Privilege

A. Resolution on State-Secrets Grounds

If we have not been fully persuasive in arguing that a Bivens remedy should not be denied in this case, we hope we have made it abundantly clear that the question is a complex and difficult one. And

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[31] We have not been asked by the parties to examine the possibility that Arar has pled facts sufficient to raise a claim under theories other than substantive due process -- such as under the *Fourth Amendment*, the *self-incrimination clause of the Fifth Amendment*, or even the *Eighth Amendment*. Because this is an appeal from a dismissal on the facts pleaded in the complaint under *Rule 12(b)(6)*, we think that even if this Court were to consider such an alternate theory and conclude that it was valid, the case would be subject to remand to the district court for further proceedings on that theory.

that underlies our principal cause for dissent. We think it improper for the Court to take the twisting road to a categorical conclusion that no plaintiff has a private right of action in these circumstances and circumstances like them, when, by a brief order, we could take steps that would likely permit the case to be resolved on its particular facts without new and strained declarations of law.

The majority makes a thinly veiled reference to the recognition of a Bivens action as "alacrity or activism." Supra, at **[37]**. The irony of its making that assertion while reaching out unnecessarily to decide a difficult issue related to separation of powers principles should not be lost. Activism in the defense of "liberty," we gather, is no vice.

"The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security." *Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991).* "In some cases, the effect of an invocation of the privilege may be so drastic as to require dismissal," as when a "proper assertion of the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim." *Id. at 547.* We share what we think to be the majority's intuition that this case would likely turn largely, if not entirely, on decisions of national security and diplomacy that the executive branch has already assured us it has good reason to keep out of public view.

[*606] Indeed, the government, while arguing before us en banc seeking affirmance on the Bivens issue, could hardly have been clearer:

> [I]t seems like at the core of your concerns and perhaps your colleagues' concerns is you don't have more information. And that might be the result of the fact that the district court did not rule on the state secrets issue, so all the classified declarations are not in the record, and if this court felt it could not address our Bivens special factors argument at this stage, and I think it can . . . then I respectfully suggest this court do a limited remand for the district court to review the state secrets issue. The government would have to update the declarations, because much time has passed, but allow the government to do that, have the district court rule on the state secrets issues and then this Court could have this declaration before it if it thought it needed to do that.

Tr. 58-59 (Cohn). And:

> Your Honor, if this Court is talking simply about a limited remand, to send this case back simply for the limited purpose of the district court examining the state secrets issue first [if the court won't ad-

> dress Bivens otherwise], I think there's a lot of sense to that, your Honor.

Id. at 62-63 (Cohn).

Recognizing that the government, like Arar and his counsel, would prefer a ruling on the merits, we nonetheless think we should be taking the government up on its alternate suggestion. Doing so would likely allow us to avoid giving sweeping answers to difficult questions of law that we are not required to ask. And it would, by well-established procedure, address what the majority cites as additional "special factors counseling hesitation" in recognizing a Bivens right of action. In particular, the majority notes these "factors":

> Judicial consideration of the issues relating to rendition involves particular "sensitivities" because of the need to discover much "classified material," supra at **[43]**, including those relating to "the national security apparatus of at least three foreign countries, as well as that of the United States," supra at **[44]**.
>
> "Cases in the context of extraordinary rendition are very likely to present serious questions relating to private diplomatic assurances from foreign countries . . ., and this feature of such claims opens the door to graymail." Supra at **[48]**; see also supra at **[51]** ("The risk of graymail

> is itself a special factor which counsels hesitation in creating a Bivens remedy.").

These are "factors" that the state-secrets privilege was designed to address.[32]

We are not without precedent here -- similar both factually and procedurally. In *El-Masri v. United States, 479 F.3d 296 (4th Cir.)*, cert. denied, *552 U.S. 947, 128 S. Ct. 373, 169 L. Ed. 2d 258 (2007)*, the issue was an alleged "special rendition" by U.S. agents of a German citizen from Macedonia to a U.S.-controlled prison in Afghanistan for the purpose of abusive interrogation. The plaintiff had brought suit, inter alia, pursuant to Bivens, for violation of his due process rights against former CIA director George Tenet, among others. The Fourth Circuit explained:

> [*607] The United States intervened as a defendant in the district court, asserting that El-Masri's civil action could not proceed because it posed an unreasonable risk that privileged state secrets would be disclosed. By its Order of May 12, 2006, the district court agreed with the position

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[32] Our discussion is limited to the government's invocation of the state-secrets privilege in the context of civil litigation. The protection of state secrets in the course of a criminal prosecution would likely raise many different and difficult issues in light of, among other things, the defendant's rights under the *Fifth* and *Sixth Amendments*.

> of the United States and dismissed El-Masri's Complaint.

Id. at 299-300. The district court, in summarizing its order, had said, "It is important to emphasize that the result reached here is required by settled, controlling law."[33] *El-Masri v. Tenet, 437 F. Supp. 2d 530, 540 (E.D. Va. 2006).* The Fourth Circuit agreed and affirmed. *El-Masri, 479 F.3d at 300.* [34]

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[33] The district court's full statement bears repeating:

> It is important to emphasize that the result reached here is required by settled, controlling law. It is in no way an adjudication of, or comment on, the merit or lack of merit of El-Masri's complaint. Nor does this ruling comment or rule in any way on the truth or falsity of his factual allegations; they may be true or false, in whole or in part. Further, it is also important that nothing in this ruling should be taken as a sign of judicial approval or disapproval of rendition programs; it is not intended to do either. In times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy. Of course, reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of those exceptional steps. But what this decision holds is that these steps are not proper grist for the judicial mill where, as here, state secrets are at the center of the suit and the privilege is validly invoked.

Tenet, 437 F. Supp. 2d at 540-41.

[34] We cite El-Masri not to endorse its conclusions, but as evidence that the procedures to be applied here are not in any sense novel.

The majority cites the possibility of "graymail" as a "special factor counseling hesitation." But as another decision of the Fourth Circuit points out, the state-secrets privilege protects this interest too, by "provid[ing] a necessary safeguard against litigants presenting the government with a Hobson's choice between settling for inflated sums or jeopardizing national security." *Sterling v. Tenet, 416 F.3d 338, 344 (4th Cir. 2005).*[35]

In Arar's case, the government followed essentially the same procedure as it had in El-Masri. The district court here (prior to the district court and court of appeals decisions in El-Masri) decided the case on Bivens grounds instead. We think that to have been mistaken.

B. Shortcomings of a State-Secrets Resolution

We discussed the state secrets doctrine in some detail in *Doe, 576 F.3d at 101-05* (describing, inter alia, the emergence of the doctrine in and after *United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953)).* We are not oblivious to the criticism to which it has been subject. There has been considerable debate about it, see, e.g., Robert

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[35] Cf. *Bivens, 403 U.S. at 410* (Harlan, J., concurring) ("I simply cannot agree with my Brother BLACK that the possibility of 'frivolous' claims -- if defined simply as claims with no legal merit -- warrants closing the courthouse doors to people in Bivens' situation. There are other ways, short of that, of coping with frivolous lawsuits.").

M. Chesney, Enemy Combatants After Hamdan v. Rumsfeld: State Secrets and the Limits of National Security Litigation, *75 Geo. Wash. L. Rev. 1249, 1263-1308 (2007)* ("Enemy Combatants"); Carrie Johnson, "Handling of 'State Secrets' At Issue," Washington Post, Mar. 25, 2009, at A1, which has been stoked by the recent surfacing of the now-declassified Air Force accident report that [*608] was the subject of Reynolds, see Barry Siegel, Claim of Privilege 205-10 (2008). [36]

But this controversy has centered on the extent of the judiciary's role in making the determination of the legitimacy of the claim of privilege and the

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[36] There have been assertions that the state-secrets invocation in Reynolds, in which the modern form of doctrine was first set forth, was a cover-up of government misfeasance, not an attempt to protect legitimate state secrets. See, e.g., Barry Siegel, Claim of Privilege at 205-10; *Herring v. United States, No. A 03 Civ. 5500 (LDD), 2004 U.S. Dist. LEXIS 18545, at *6-*7, 2004 WL 2040272, at *2 (E.D. Pa. Sept. 10, 2004)*; but see *Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005)* (deciding, after review of the report, that the government's "assertion of military secrets privilege for [the] accident report [in Reynolds] . . . was [not a] fraud upon the court"), cert. denied, *547 U.S. 1123, 126 S. Ct. 1909, 164 L. Ed. 2d 685 (2006)*. The government has recently implemented procedures that heighten the standard governing what information can be protected under the privilege and create multiple levels of oversight requiring that a State Secrets Review Committee, an Assistant Attorney General, the Deputy Attorney General, and the Attorney General approve the assertion of the privilege before the government attempts to invoke it any particular case. See Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009), available at http://www.justice.gov/opa/documents/state-secret-privileges.pdf.

consequences of the government's refusal to produce subpoenaed material necessary to the prosecution of the plaintiff's claim. See, e.g., Enemy Combatants, *75 Geo. Wash. L. Rev. at 1288.*[37] No one can seriously doubt the need for a mechanism by which the government can effectively protect its legitimate military and diplomatic secrets. The question is whether

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[37] Questions that have been raised include: Did the Reynolds dissenters, and the Third Circuit and Eastern District of Pennsylvania before them, see *Reynolds v. United States, 192 F.2d 987, 990 (3d Cir. 1951),* have the better of the argument when concluding that the judicial role is not fully exercised in any case without an in-chambers, ex parte review of the allegedly privileged material? Cf. State Secret Protection Act of 2009, H.R. 984, 111th Cong. § 5(a) ("Once the Government has asserted the privilege . . . the court shall undertake a preliminary review of the information the Government asserts is protected by the privilege . . . ."); State Secrets Protection Act, S. 417, 111th Cong. § 2 (2009) (providing that, absent certain exceptions "the United States shall make all evidence the United States claims is subject to the state secrets privilege available for the court to review, consistent with [specified requirements], before any hearing conducted under this section"). Should the monetary loss occasioned as the result of the invocation of the privilege fall invariably and exclusively on plaintiffs? See Enemy Combatants, *75 Geo. Wash. L. Rev. at 1312-13.* How finely grained a showing should be required before an action is dismissed in light of a successful state-secrets invocation? See Editorial, The State-Secrets Privilege, Tamed, N.Y. Times, Apr. 30, 2009, at A26 (opining on what it characterized as "the affront to civil liberties and the constitutional separation of powers in the Justice Department's argument that the executive branch is entitled to have lawsuits shut down whenever an official makes a blanket claim of national security"); see also msnbc.com, "Full transcript of President Barack Obama's news conference, Apr. 29, 2009," http://www.msnbc.msn.com/id/30488052// (The President: "I actually think that the state secret doctrine should be modified. I think right now it's overbroad.").

those procedures now in place best balance the need for secrecy with competing values and interests. The critics do not, we think, seek to avoid at all cost and in all circumstances the ability of the government to protect state-secrets in civil litigation or the possibility that some such litigation will ultimately be resolved as a result.

C. The Majority's Objections

The majority has two objections to a state-secrets resolution.

First, it hints that we have an "unflagging" obligation to address the Bivens issue before turning to the question of state secrets. See supra at [39] ("True, courts can -- with difficulty and resourcefulness -- consider state secrets and even reexamine judgments made in the foreign affairs context when we must, that is, when there is an unflagging duty to exercise our jurisdiction." (emphasis in original)). We highly doubt the jurisprudential necessity of addressing a broader, more difficult Bivens question when this case [*609] might be resolved on its facts by application of well-established state-secrets procedures. As the panel majority pointed out, non-merits dispositions do not require a predicate decision on subject-matter jurisdiction:

> The Supreme Court has, on several occasions, recognized that a federal court has leeway to choose among threshold

> grounds for denying audience to a case on the merits. . . . [A] federal court that dismisses on non-merits grounds before finding subject-matter jurisdiction makes no assumption of law-declaring power that violates separation of powers principles.

See *Arar, 532 F.3d at 172* (internal quotation marks, citations, and ellipses omitted). The Supreme Court acted similarly in Iqbal, assuming the viability of a Bivens action in order to decide the case on the basis of pleading and supervisory liability. See *Iqbal, 129 S. Ct. at 1948.*

Second, the majority professes concern about the "[t]he court's reliance on information that cannot be introduced into the public record," which the Court says "is likely to be a common feature of any Bivens actions arising in the context of alleged extraordinary rendition." Supra at **[42]**. The majority thinks that this concern "should provoke hesitation, given the strong preference in the Anglo-American legal tradition for open court proceedings." Supra at **[42-43]**.

"'A trial is a public event. What transpires in the court room is public property.'" *Richmond Newspapers v. Virginia, 448 U.S. 555, 574 n.9, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980)* (plurality opinion) (quoting *Craig v. Harney, 331 U.S. 367, 374, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947)).* We applaud the majority's recognition of the fundamental importance of

the principle that the courts are presumed to be open. See supra at [44]; and see, e.g., *Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982)*. It respects this Circuit's history of meticulously guarding constitutional protection for "access to the courts" in the sense of the ability of a citizen to see and hear, and in that way to participate in, the workings of the justice system.[38] See, e.g., *Huminski v. Corsones, 396 F.3d 53, 56 (2d Cir. 2005)*; *Hartford Courant Co. v. Pellegrino, 380 F.3d 83 (2d Cir. 2004)*; *ABC, Inc. v. Stewart, 360 F.3d 90 (2d Cir. 2004)*; *United States v. Graham, 257 F.3d 143 (2d Cir. 2001)*; *Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16 (2d Cir. 1984)*, cert. denied, *472 U.S. 1017, 105 S. Ct. 3478, 87 L. Ed. 2d 614 (1985)*; *Joy v. North, 692 F.2d 880 (2d Cir. 1982)*. But it follows not at all, we think, from the presumption of openness however gauged that the open nature of the federal courts is properly weighed as a factor in the Bivens analysis.

The presumption of openness is just that, a presumption. In can be, and routinely is, overcome. We regularly hear, on the basis of partially or totally sealed records, not only cases implicating national

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[38] This is "access to courts" in a sense quite different from the "access to courts" argument made by Arar referring to the frustration of his ability to seek relief from the judiciary. Cf. *Huminski v. Corsones, 386 F.3d 116, 145 n.30 (2d Cir. 2004)* (distinguishing between a litigant's due process right of access and the press and public's right of access under the *First Amendment*).

security or diplomatic concerns, see, e.g., *Doe, 576 F.3d 95*; *In re Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh, 552 F.3d 93 (2d Cir. 2008)*, cert. denied, *129 S. Ct. 2778, 174 L. Ed. 2d 273 (2009)*, but those involving criminal defendants' cooperation with prosecutors, see, e.g., *United States v. Doe, 314 F. App'x 350 (2d Cir. 2008)* (summary order), [*610] other criminal matters, see, e.g., *U.S. v. Silleg, 311 F.3d 557, 560 (2d Cir. 2002)*, probation department reports, upon which federal criminal sentences are to a significant extent typically based, see, e.g., *United States v. Parnell, 524 F.3d 166, 168 n.1 (2d Cir. 2008)* (per curiam); *United States v. Molina, 356 F.3d 269, 275 (2d Cir. 2004)*, child welfare, see, e.g., *Sealed v. Sealed, 332 F.3d 51 (2d Cir. 2003)*, trade secrets, see, e.g., *In re Orion Pictures Corp., 21 F.3d 24 (2d Cir. 1994)*, and any manner of other criminal and civil matters. Hardly a week goes by, in our collective experience, in which some document or fact is not considered by a panel of this Court out of the public eye.

We accommodate the public interest in proceedings before federal courts by rigorously adhering to the presumption of openness, but the presumption is often overcome. The majority's notion that because the presumption is likely to be overcome in a particular species of case we should therefore foreclose a remedy or otherwise limit our jurisdiction in order to accommodate the public suspicion of secrecy, is misconceived. Denying relief to an entire class of persons with presumably legitimate claims in part because

some of their number may lose in proceedings that are held in secret or because secrets may cause some such claims to fail, makes little sense to us. It could work endless mischief were courts to turn their backs on such cases, their litigants, and the litigants' asserted rights. We are not aware of any other area of our jurisprudence where the ability to overcome the presumption of openness has been relied upon to deny a remedy to a litigant. We do not think it should be here.

CONCLUSION

For the foregoing reasons and to the extent indicated, we respectfully dissent.

BARRINGTON D. PARKER, Circuit Judge, joined by Judges CALABRESI, POOLER, and SACK, dissenting:

I join Judge Sack's, Judge Pooler's, and Judge Calabresi's opinions in full. My point of departure from the majority is the text of the Convention Against Torture, which provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Art. 2, cl. 2, December 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 ("Convention Against Torture"). Because the majority has neglected this basic commitment and a good deal more, I respectfully dissent.

Maher Arar credibly alleges that United States officials conspired to ship him from American soil, where the Constitution and our laws apply, to Syria, where they do not, so that Syrian agents could torture him at federal officials' direction and behest. He also credibly alleges that, to accomplish this unlawful objective, agents of our government actively obstructed his access to this very Court and the protections established by Congress. *See 8 U.S.C. § 1252(a)(2)(D)* (providing for judicial review of constitutional claims or questions of law raised by an order of removal).

While I broadly concur with my colleagues who dissent, I write separately to underscore the miscarriage of justice that leaves Arar without a remedy in our courts. The majority would immunize official misconduct by invoking the separation of powers and the executive's responsibility for foreign affairs and national security. Its approach distorts the system of checks and balances essential to the rule of law, and it trivializes the judiciary's role in [*611] these arenas. To my mind, the most depressing aspect of the majority's opinion is its sincerity.

A primary theme of the majority's approach is deference to executive authority, especially in a time of national unrest, turmoil, or danger. The conduct of foreign policy and the maintenance of national security are surely executive and legislative powers. Yet those powers are not limitless. The bounds in both wartime and peacetime are fixed by the same Constitution. *See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120-21, 18 L. Ed. 281 (1866).* Where appropriate, deference to the coordinate branches is an essential element of our work. But there is, in my view, an enormous difference between being deferential and being supine in the face of governmental misconduct. The former is often necessary, the latter never is. At the end of the day, it is not the role of the judiciary to serve as a help-mate to the executive branch, and it is not its role to avoid difficult decisions for fear of complicating life for federal officials. Always mindful of the fact that in times of national stress and turmoil the rule of law is everything, our role is to de-

fend the Constitution. We do this by affording redress when government officials violate the law, even when national security is invoked as the justification. *See U.S. Const. art. I, § 9, cl. 2; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952).*

Notably, the majority opinion does not appear to dispute the notion that Arar has stated an injury under the *Fifth Amendment of the Constitution*. That is heartening, because, by any measure, the notion that federal officials conspired to send a man to Syria to be tortured "shocks the conscience." *Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952).* What is profoundly disturbing, however, is the Court's pronouncement that it can offer Arar no opportunity to prove his case and no possibility of relief. This conclusion is at odds with the Court's responsibility to enforce the Constitution's protections and cannot, in my view, be reconciled with *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971),* which remains good law to this day. *See also Davis v. Passman, 442 U.S. 228, 248-49, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* (declaring *Bivens* remedy for alleged *Fifth Amendment* violations). The majority is at odds, too, with our own State Department, which has repeatedly taken the position before the world community that this exact remedy is available to tor-

ture victims like Arar.[1] If the Constitution ever implied a damages remedy, this is such a case -- where executive officials llegedly blocked access to the remedies chosen by Congress in order to deliver a man to known torturers.

The Court's hesitation today immunizes official conduct directly at odds with the express will of Congress and the most basic guarantees of liberty contained in the Constitution. By doing so, the majority risks a government that can interpret the law to suits its own ends, without scrutiny. *See* Memorandum from John Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense, Jan. 9, 2002, in The Torture Papers: The Road to Abu Ghraib 38 (Karen J. Greenberg & [*612] Joshua L. Dratel eds., 2005); *The Federalist No. 48*, at 281 (James Madison) (Clinton Rossiter ed., 1961) (warning against the "tyrannical concentration of all the powers of government in the same hands"). Contrary to the majority, I believe that the Constitution affords Arar a remedy should he prove his sobering allegations, and that his case should be permitted to proceed.

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[1] *See* United States Written Response to Questions Asked by the United Nations Committee Against Torture, P 5 (bullet-point 5) (Apr. 28, 2006), *available at* http://www.state.gov/g/drl/rls/68554.htm; United States Report to the United Nations Committee Against Torture, PP 51 (bullet-point 5), 274, U.N. Doc. CAT/C/28/Add/5 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf.

I

The majority discovers myriad reasons to "hesitate" in the face of Arar's complaint that federal officials conspired to send him to Syria to be tortured. Its principal reason, however, is that permitting such an action "would have the natural tendency to affect diplomacy, foreign policy and the security of the nation." **Maj. Op. at 38**. This view of the separation of powers, which confines the courts to the sidelines, is, in my view, deeply mistaken; it diminishes and distorts the role of the judiciary especially during times of turmoil.

When presented with an appropriate case or controversy, courts are entitled -- indeed obliged -- to act, even in instances where government officials seek to shield their conduct behind invocations of "national security" and "foreign policy." *See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)*; *Reid v. Covert, 354 U.S. 1, 23-30, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957)*; *Youngstown, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417. Compare Ex parte Quirin, 317 U.S. 1, 19, 63 S. Ct. 2, 87 L. Ed. 3 (1942)* (observing the "duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty"), *with* **Maj. Op. at 42** (suggesting that Arar's allegations do not trigger the Court's "unflagging duty to exercise [its] jurisdiction"). This authority derives directly from the Constitution and goes hand

in hand with the responsibility of the courts to adjudicate all manner of cases put before them.

The active management of foreign policy and national security is entrusted to the executive and legislative branches. *See* U.S. Const. art. I, § 8; Art. II, § 2. But this does not mean that executive and legislative officials are left to adhere to constitutional boundaries of their own accord, without external restraint. That is the job of the courts. As Madison declared when he introduced the *Bill of Rights* to Congress:

> If [these amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 *Annals of Cong.* 439 (Joseph Gales ed., 1834). The Constitution established three co-equal branches of government, each operating as a check upon the others. In this way, the separation of powers was designed as a limiting principle of government -- not to silence any one branch, as the majority implies here, but to enlist each as "a sentinel over the public

rights." *The Federalist No. 51*, at 290 (James Madison) (Clinton Rossiter ed., 1961).

The majority treats the separation of powers as a reason for the Court to abstain in this case -- in reality, it is precisely the opposite. The executive's core responsibility for foreign policy does not negate the judiciary's duty to interpret and enforce constitutional limits. "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." [*613] *Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S. Ct. 231, 78 L. Ed. 413 (1934)*; *Boumediene v. Bush, 128 S. Ct. 2229, 2246, 171 L. Ed. 2d 41 (2008)*. One branch impermissibly intrudes upon another not when it fulfills its prescribed role but when it seeks to exercise authority assigned to its coordinate branches. *See Youngstown, 343 U.S. at 587-89* (holding that the President had exceeded his executive powers when he assumed the "law making power" entrusted to "Congress alone in both good and bad times"); *Bowsher v. Synar, 478 U.S. 714, 726, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986)* (holding that Congress may not remove executive officers except by impeachment); *The Federalist No. 47*, at 270-71 (James Madison) (Clinton Rossiter ed., 1961) ("[W]here the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted."). The defendants before us could, of course, be fully exonerated in the end, but it is the Court's

role to determine the legality of their actions for itself.

In this case, Arar does not ask the Court to assume any executive functions -- to dispatch diplomatic representatives, negotiate treaties, or oversee battlefield decisions. Likewise, the suit does not implicate his release or rescue from Syrian custody. Rather, Arar asks the Court to perform a core judicial function: To interpret the laws and Constitution as they apply to detailed allegations of official misconduct on American soil. And he petitions for a familiar judicial remedy: money damages. *See Bivens, 403 U.S. at 395*. Such a suit does not represent judicial interference in executive functions, as the majority would have it, but rather an effort to keep executive power within constitutional limits. *See Buckley v. Valeo, 424 U.S. 1, 121, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)* (recognizing that each branch necessarily participates in the affairs of the others); *Mistretta v. United States, 488 U.S. 361, 380-81, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989)*. Respectfully, I believe the majority's deference dissolves the very protections and liberties that the separation of powers was intended to guarantee.

II

The Supreme Court has repeatedly made clear that the separation of powers does not prevent the judiciary from ruling on matters affecting national security, and that the courts are competent to under-

take this task. *See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 535, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)* ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" in establishing procedures for designating enemy combatants); *New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971)* (holding that asserted military interests could not justify prior restraint of the press); *Youngstown, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417*; *Ex parte Quirin, 317 U.S. at 19.*[2]

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[2] In *Little v. Barreme, 6 U.S. (2 Cranch) 170, 179, 2 L. Ed. 243 (1804)*, for example, the Supreme Court found a naval captain "answerable in damages" for his unlawful seizure of a Danish trading ship, even where a Presidential order appeared to authorize the seizure. The Court did not hesitate, as here, to address the legality of the President's order or the seizure itself. "A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution." *Id. at 170*; *see also Talbot v. Seeman, 5 U.S. (1, 2 L. Ed. 15 Cranch) 1 (1801)* (determining the legality of the navy's capture of foreign merchant vessel during undeclared conflict with France); *The Prize Cases, 67 U.S. (2 Black) 635, 17 L. Ed. 459 (1862). Ex parte Milligan, 71 U.S. (4 Wall.) 2, 18 L. Ed. 281 (1866)*, rejected the government's claim that civil war authorized the executive branch to act as "supreme legislator, supreme judge, and supreme executive." William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 121 (1998) (quoting the government's brief in *Milligan*). "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan, 71 U.S. at 120-21.*

[*614] Courts routinely handle classified materials and exercise judgment about both the credibility and legal significance of the security interests asserted by the government. *See* Foreign Intelligence Surveillance Act of 1978 (FISA), *50 U.S.C. §§ 1801-1811, 1821-29, 1841-46, 1861-62 (2006)*; Freedom of Information Act (FOIA), *5 U.S.C. § 552(a)(4)(B) & (b)(1) (2006)*; *amended* by Open FOIA Act of 2009, Pub. L. No. 111-83, 123 Stat. 2142, 2184 (2009) Classified Information Procedures Act (CIPA), 18 U.S.C. App. III §§ 1-16; *Boumediene v. Bush, 128 S. Ct. 2229, 2261, 171 L. Ed. 2d 41 (2008)* ("The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."); *United States v. United States District Court (Keith), 407 U.S. 297, 320, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)* ("We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation."). These cases belie the majority's notion that the courts lack authority or competency to assess Arar's claims. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin, 287 U.S. 378, 401, 53 S. Ct. 190, 77 L. Ed. 375 (1932)).*

The courts have a duty to scrutinize unilateral assertions of security and secrecy because the government's account has, in many of these cases, been overblown. Recent disclosures suggest that the mili-

tary secrets so fiercely guarded in *United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953)* -- the Supreme Court's seminal state secrets case -- may well have posed no threat to national security. *See Herring v. United States, 2004 U.S. Dist. LEXIS 18545, 2004 WL 2040272, at *5 (E.D. Pa. Sept. 10, 2004), aff'd, 424 F.3d 384 (3d Cir. 2005)* (finding no deliberate fraud upon the court, but noting "the apparent dearth of sensitive information in the accident investigation report and witness statements"); Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 166-69 (2006).

A similar truth has emerged from the Pentagon Papers case, *New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971)*. Although the government argued to the Supreme Court that publication posed a "grave and immediate danger to the security of the United States," former Solicitor General Griswold has since acknowledged that the executive's primary concern was "not with national security, but rather with governmental embarrassment." Erwin N. Griswold, Secrets Not Worth Keeping, Wash. Post, Feb. 15, 1989, at A25; *cf.* Office of the Attorney General, Mem. on Policies and Procedures Governing Invocation of the State Secrets Privilege 2 (Sept. 23, 2009) (issuing revised guidelines and clarifying that the Department of Justice "will not defend an invocation of the [state secrets] privilege in order [*615] to . . . prevent embarrassment to a person, organization, or

agency of the United States government"). The appropriate tools for evaluating national security concerns are already firmly established in our law -- namely, the state secrets privilege and CIPA. They do not require wholesale abstention by the courts.

Indeed, a number of cases in which courts have acceded in this way, relying on bald appeals to national security, have proven deeply troubling in retrospect. The Supreme Court's decisions upholding convictions under the Sedition Act of 1918 are regarded as indefensible today. *See Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470, 17 Ohio L. Rep. 26, 17 Ohio L. Rep. 149 (1919)*; *Debs v. United States, 249 U.S. 211, 39 S. Ct. 252, 63 L. Ed. 566, 17 Ohio L. Rep. 1 (1919)*; *Abrams v. United States, 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919)*; *Morse v. Frederick, 551 U.S. 393, 442, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007)* (Stevens, J., dissenting) (observing that Justice Holmes' dissent in *Abrams* has "emphatically carried the day"). More recently, the dire warnings issued to justify the indefinite detention of enemy combatants and forestall further court review have also drawn stern rebuke. In *Padilla v. Hanft, 432 F.3d 582, 584-587 (4th Cir. 2005)*, the Fourth Circuit observed that the government had "steadfastly maintain[ed] that it was imperative in the interest of national security" to hold Padilla in military custody for three and a half years. Yet officials abruptly changed course on the doorstep of Supreme Court review, seeking to move Padilla into criminal custody, at a "substantial cost to the

government's credibility before the courts." *Id. at 584. See also* Brief for Respondents, *Hamdi v. Rumsfeld, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)* (No. 03-6696) (arguing that military necessity required Hamdi's indefinite detention, yet releasing him to Saudi Arabia seven months later).

Finally, contrary to the majority's suggestion, the courts require no invitation from Congress before considering claims that touch upon foreign policy or national security. *See* **Maj. Op. at 10-11, 42-43, 57.** In fact, the Supreme Court has demonstrated its willingness to enter this arena against the express wishes of Congress. In *Boumediene v. Bush, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008)*, the Supreme Court rebuffed legislative efforts to strip the courts of jurisdiction over detainees held at Guantanamo Bay. It held that the writ of habeas corpus extended to the naval base, and that neither Congress nor the executive branch could displace the courts without formally suspending the writ. Importantly, it did so despite the fact that this exercise of judicial power plainly affected the executive's detention of hundreds of enemy combatants and a centerpiece of the war on terror. The Court recognized that habeas proceedings "may divert the attention of military personnel from other pressing tasks" but refused to find these concerns "dispositive." *Id. at 2261.* Scores of decisions have since followed this lead. *See, e.g., Al Rabiah v. United States, 2009 U.S. Dist. LEXIS 88936, 2009 WL 3048434 (D.D.C. Sept. 17, 2009); Ahmed v. Obama, 613 F. Supp. 2d 51 (D.D.C. 2009).* Courts

cannot blithely accept every assertion of national security at face-value, and they are entitled to enforce constitutional limits by scrutinizing such claims.

III

Although Arar credibly alleges mistreatment in both the United States and Syria, the circumstances of his detention on American soil are summarily excluded from the majority's *Bivens* analysis. Instead, the Court concludes that Arar has not pleaded these allegations with the factual detail required by *Bell Atlantic Corp.* [*616] *v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).* *See* **Maj. Op. at 23-24**. Consequently, it dismisses Claim Four and proceeds as though the challenged conduct is strictly extraterritorial.[3] This conclusion

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[3] The majority identifies extraordinary rendition as the context for Arar's *Bivens* claims, a label that reduces the complaint to the fact of his transfer to Syria. *See* **Maj. Op. at 8, 32-33**. In doing so, the majority largely disregards the events both before and after Arar's transfer that are part and parcel of his claim for relief. Arar does not merely allege that he was rendered to Syria without process, but that he was first detained in the United States for twelve days, during which time he was held in harsh and punitive conditions, coercively interrogated, and deliberately denied access to counsel, his consulate, and the courts by American officials. *See* Compl. PP 2, 4, 32-49, 91-93. Moreover, the purpose and culmination of this mistreatment was not simply Arar's removal from the United States. Rather, American officials allegedly set out to render him to Syria either intending or knowing that Arar would be tortured there, and aided this abuse by providing information to his captors. *See id.* PP 55-57. One hopes that all extraordinary rendition is

goes far beyond any pleading rule we are bound to apply, and it is inconsistent with both *Rule 8 of the Federal Rules of Civil Procedure* and recent Supreme Court decisions.

Even after *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*, which dismissed discrimination claims against policymakers on account of inadequate pleading, Claim Four readily exceeds any measure of "plausibility." Claim Four seeks to hold Defendants John Ashcroft, Larry Thompson, Robert Mueller, James Ziglar, J. Scott Blackman, Edward McElroy, and John Does 1-10 responsible for the extreme conditions under which Arar was held in the United States.[4] While the majority finds that Arar failed to allege the requisite "meeting of the minds" necessary to support a conspiracy, *see* **Maj. Op. 24**, it ignores the fact that Arar pleaded multiple

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not for the purpose of torture; certainly, this abuse is not one of the attributes that the majority attaches to that label. *See* **Maj. Op. at 9-10 n.1**. All told, extraordinary rendition is the method by which Arar was transferred to Syria, but it hardly captures the constitutional injuries described in his complaint.

[4] At the time of Arar's detention, Defendant Ashcroft was Attorney General of the United States; Defendant Thompson was Deputy United States Attorney General; Defendant Robert Mueller was the Director of the Federal Bureau of Investigation (FBI); Defendant Ziglar was Commissioner of the Immigration and Naturalization Service (INS); Defendant Blackman was Regional Director of the INS for the Eastern District; Defendant McElroy was District Director for the INS for the New York City District; and John Does 1-10 were federal law enforcement agents employed by the FBI or INS. *See* Compl. PP 14-22.

theories of liability. Formal conspiracies aside, he also alleges that the defendants commonly aided and abetted his detention and removal -- that is, that the defendants were personally involved in his mistreatment both in the United States and abroad. *See Hayut v. State Univ. of New York, 352 F.3d 733, 753 (2d Cir. 2003)* (A supervisory official personally participates in challenged conduct not only by direct participation, but by (1) failing to take corrective action; (2) creation of a policy or custom fostering the conduct; (3) grossly negligent supervision, or (4) deliberate indifference to the rights of others); *Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 254 (2d Cir. 2001).*

In support of his claim for mistreatment and due process violations while in American custody, Arar includes factual allegations that are anything but conclusory. Indeed, he provides as much factual support as a man held incommunicado could reasonably be expected to offer a court at this stage. The complaint alleges that Defendant McElroy was personally involved [*617] in Arar's failure to receive the assistance of counsel. *See* Compl. P 43. It alleges that Defendants Blackman and Thompson personally approved Arar's expedited transfer from the United States to Syria, implicating these officials in his inability to access the courts. *Id.* PP 15, 47-48. And it recounts statements by Arar's American interrogators that they were discussing his situation with "Washington D.C." *Id.* P 45; *see also* Dep't of Homeland Security, Office of the Inspector General, The

Removal of a Canadian Citizen to Syria ("OIG Report") at 11 (reporting that DOJ and INS officials in Washington, D.C. learned of Arar's apprehension on the evening of Thursday, September 26, 2002, 12 days before he was rendered to Syria via Jordan). More broadly, Arar details the harsh conditions under which he was held, including shackling, strip searches, administrative segregation, prolonged interrogation, and a near communications blackout. *See id.* PP 29-47. Notably, these are not "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal, 129 S. Ct. at 1949.* They easily satisfy the requirements of both *Iqbal* and also *Rule 8*, whose "short and plain statement" remains the baseline for notice-pleading. *See Fed. R. Civ. P. 8(a)(2).*

Moreover, as *Iqbal* made clear, plausibility is "context-specific," requiring the reviewing court "to draw on its experience and common sense." *Iqbal, 129 S. Ct. at 1950.* There, the Supreme Court rejected Iqbal's discrimination claims against high-ranking federal officials because his complaint lacked sufficient factual allegations supporting the inference of discriminatory intent. *Id. at 1952.* Central to the majority's decision was the fact that these officials faced a devastating terrorist attack "perpetrated by 19 Arab Muslim hijackers." *Id. at 1951.* Against this backdrop, the majority found Iqbal's claim overwhelmed by the "obvious alternative explanation" -- that his arrest stemmed from a "nondiscriminatory intent to detain aliens . . . who had po-

tential connections to those who committed terrorist acts." *Id. at 1951* (quoting *Twombly, 550 U.S. at 567*). Apparently having their own views about the defendants' state of mind, the majority simply found Iqbal's discrimination claim incredible.

Plausibility, in this analysis, is a relative measure. Allegations are deemed "conclusory" where they recite only the elements of the claim. They become implausible when the court's commonsense credits far more likely inferences from the available facts. *See Harris v. Mills, 572 F.3d 66, 71-72 (2d Cir. 2009)*. Plausibility thus depends on a host of considerations: The full factual picture presented by the complaint, the particular cause of action and its elements, and the available alternative explanations. *See Iqbal, 129 S. Ct. at 1947-52*. As *Rule 8* implies, a claim should only be dismissed at the pleading stage where the allegations are so general, and the alternative explanations so compelling, that the claim no longer appears plausible. *See Fed. R. Civ. P. 8(a); Twombly, 550 U.S. at 556* (requiring simply "enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claims).

Arar's claim readily survives this test, particularly in light of the Court's obligation to "draw[] all reasonable inferences in the plaintiff's favor" on a motion to dismiss. *See Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)*. The notion that high-ranking government officials like Defendants Ashcroft and Mueller were personally involved

in setting or approving the conditions under which suspected terrorists would be held on American soil -- and even oversaw [*618] Arar's detention and removal -- is hardly far-fetched. Arar's arrival at JFK airport was a significant event in September 2002, triggering all manner of security responses. *See, e.g.*, Compl. P 45; OIG Report at 11, 15 (citing "high-level interest in Arar in Washington, DC"); *id.* at 30 n.31 (describing the four-vehicle convoy in which Arar was transported, including nine INS officers equipped with their service weapons, Remington 870 shotguns, M-4 rifles, helmets, and ballistic vests). The fact that Arar was covertly transferred to Syria, by itself, indicates involvement at the highest levels of government.

In contrast to *Iqbal*, it is the alternative here that is difficult to fathom. To think that low-level agents had complete discretion in setting the conditions for holding a suspected member of al Qaeda defies commonsense. It requires the Court to believe that, while high-level officials were involved in arranging Arar's removal to Syria -- a premise the majority does not question[5] -- they were oblivious to the particulars of his detention. The majority was, of course, bound to credit all reasonable inferences from

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[5] Likewise, the majority finds these very same allegations sufficient for purposes of personal jurisdiction, as did the panel. *See* **Maj. Op. at 19**; *Arar v. Ashcroft, 532 F.3d 157, 173-75 (2d Cir. 2008)* (panel op.) (applying identical personal involvement standard in considering personal jurisdiction and finding it met).

the allegations in the complaint, understanding that their factual basis would be thoroughly tested in discovery. *See Twombly, 550 U.S. at 555* (a court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"). The inference that, in 2002, high-level officials had a role in the detention of a suspected member of al Qaeda requires little imagination.

Further, unlike *Iqbal*, Arar's due process claims do not ask the Court to speculate about the mental state of government officials. Rather, Claim Four rests on objective factors -- the conditions of confinement and his access to the courts -- that are independent of motive. *Compare Iqbal, 129 S. Ct. at 1948* (claim of invidious discrimination requires the plaintiff to "plead and prove that the defendant acted with discriminatory purpose"), *with Kaluczky v. City of White Plains, 57 F.3d 202, 211 (2d Cir.1995)* (government conduct that is "arbitrary, conscience-shocking, or oppressive in a constitutional sense" violates substantive due process). The complaint contains more than sufficient factual allegations detailing these deprivations. *See* Compl. PP 27-49.

Finally, it should not be lost on us that the Department of Homeland Security's Office of Inspector General has itself confirmed the broad contours of Arar's mistreatment, producing a lengthy report on the conditions of his detention in American custody. *See* OIG Report. This report provides a powerful indication of the reliability of Arar's factual alle-

gations at this stage.[6] Plainly, the majority has read the OIG report, even citing it for limited purposes in its opinion. *See* **Maj. Op. at 48.** It is difficult, then, to comprehend how the majority can ignore the report's findings and conclusions in assessing the basic plausibility of Arar's fourth claim.

Ultimately, it is unclear what type of allegations to overcome a motion to dismiss by high-level officials could ever satisfy the majority. In refusing to credit Arar's allegations, the majority cites the complaint's use of the "passive voice" in [*619] describing some of the underlying events. *See* **Maj. Op. at 25.** This criticism is odd because the occasional use of the passive voice has not previously rendered pleadings defective, particularly where the defendants' roles can be easily ascertained from the overall complaint. *See* Compl. PP 14-22; *Yoder v. Orthomolecular Nutrition Institute, Inc., 751 F.2d 555, 561 (2d Cir. 1985)* ("It is elementary that, on a motion to dismiss, a complaint must be read as a whole, drawing all inferences favorable to the pleader.") (citations omitted). Specifically, the majority faults Arar for not pinpointing the individuals responsible for each event set out in the complaint and for failing to particularize more fully when and with whom they conspired. The irony involved in imposing on a plaintiff -- who was held in solitary confinement and then

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[6] In *Iqbal*, the Supreme Court looked beyond the complaint to a wider factual context in assessing plausibility. *See 129 S. Ct. at 1951-52.*

imprisoned for ten months in an underground cell -- a standard so self-evidently impossible to meet appears to have been lost on the majority.

The flaws in the majority's approach are not unique to Arar, but endanger a broad swath of civil rights plaintiffs. Rarely, if ever, will a plaintiff be in the room when officials formulate an unconstitutional policy later implemented by their subordinates. Yet these closeted decisions represent precisely the type of misconduct that civil rights claims are designed to address and deter. *See Carlson v. Green, 446 U.S. 14, 21, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).* Indeed, it is this kind of executive overreaching that the *Bill of Rights* sought to guard against, not simply the frolic and detour of a few "bad apples." The proper way to protect executive officials from unwarranted second-guessing is not an impossible pleading standard inconsistent with *Rule 8*, but the familiar doctrine of qualified immunity.

Even if the majority finds that Arar's factual allegations fall short of establishing the personal involvement of Defendants Ashcroft and Mueller, they plainly state a claim against defendants such as Thompson, Blackman, McElroy, and John Doe FBI and ICE agents. *See* Compl. PP 43, 47-48, 55. The direct involvement of these defendants is barely contested by the appellees and barely mentioned by the majority. For this reason alone, there is no legal justification for the majority to dismiss Claim Four outright.

IV

When the full range of alleged mistreatment is considered, Arar's injuries hardly constitute a "new" context for *Bivens* claims, and I agree with both Judge Sack's and Judge Pooler's careful analyses. This Court has repeatedly assumed that *Bivens* extends to substantive due process claims and provides a damages remedy to other detainees illegally injured by executive officials or their agents. *See Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*; *Thomas v. Ashcroft, 470 F.3d 491, 497 (2d Cir. 2006)*; *Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000)*. Our State Department is of the same view, having assured the United Nations' Committee Against Torture that a *Bivens* remedy is available to torture victims. *See* United States Written Response to Questions Asked by the United Nations Committee Against Torture, P 5 (bullet-point 5) (Apr. 28, 2006), *available at* http://www.state.gov/g/drl/rls/68554.htm.[7]

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[7] Responding to the Committee's question, "What guarantees and controls does [the United States] have to ensure the monitoring of the activities of law enforcement officials in prisons and other detention centres . . . under its jurisdiction or de facto control," the State Department acknowledged among other remedies: "Suing federal officials for damages under provisions of the U.S. Constitution for 'constitutional torts,' *see Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, and *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*."

[*620] Even if Arar's case were viewed as a new context, the "special factors" cited by the majority do not justify denying him relief because they are not "special." They largely duplicate concerns -- like state secrets, sovereign immunity, and qualified immunity -- amply addressed by other doctrines at the Court's disposal. *See Davis v. Passman, 442 U.S. 228, 246, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* (refusing to hesitate where special factors were "coextensive with the protections afforded by the *Speech or Debate Clause*"). My colleagues make these arguments in greater detail, cataloging the flaws in the majority's *Bivens* analysis. I write to emphasize the heightened need for a *Bivens* remedy in cases such as this where executive officials have deliberately thwarted the remedies provided by Congress and obstructed access to the courts. Arar's claims in this regard supply an exceptionally compelling justification for affording a *Bivens* remedy, going well beyond the allegations that gave rise to *Bivens* in the first place.

The judicial role recognized in *Bivens* reflects an important institutional balance -- one closely aligned with separation of powers. *Bivens* offers Congress the first opportunity to fashion a remedy for invasions of individual rights protected by the Constitution. However, when a legislative judgment is lacking, *Bivens* permits the courts to use their common-law powers to fill crucial gaps and provide redress in appropriate instances. This line of cases thus instructs the courts to tread lightly where Con-

gress has spoken, presuming that in those instances constitutional interests have been adequately addressed by the legislative branch. *See Schweiker v. Chilicky, 487 U.S. 412, 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)* ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.").

On the other hand, where no legislative remedy exists, *Bivens* reaffirms the courts' power to ensure that individuals can obtain relief for constitutional injuries. The courts, within this framework, provide a forum of last resort; through *Bivens*, they stand behind constitutional guarantees neglected by the political branches. *Compare Bivens, 403 U.S. at 410* (Harlan, J., concurring) (implying a remedy where constitutional injury would otherwise go unredressed), *with Bush v. Lucas, 462 U.S. 367, 388, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)* (denying *Bivens* remedy in light of the "elaborate remedial system" established by Congress).

Even so, this remedy is constrained by "special factors" that counsel hesitation even in the "absence of affirmative action by Congress." *Bivens, 403 U.S. at 396*. The Supreme Court has never provided an exhaustive definition of these special factors, and

existing precedent offers only a few data-points.[8] But it has [*621] nonetheless indicated that this analysis should "weigh [] reasons for and against the creation of a new cause of action, the way common law judges have always done." *Wilkie v. Robbins, 551 U.S. 537, 554, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007).* In *Wilkie*, for example, the factor that ultimately counseled hesitation was the difficulty of distinguishing unconstitutional conduct from lawful government activity. *Id. at 555-61.* In earlier cases, involving claims by military personnel, the Supreme Court cited Congress' plenary authority "To make Rules for the Government and Regulation of the land and naval Forces," and its adoption of the Uniform Code of Military Justice. *See Chappell v. Wallace, 462 U.S. 296, 301-03, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)* (citing *U.S. Const. art. I, § 8, cl. 12-14; 10 U.S.C. § 938*); *see also United States v. Stanley, 483 U.S. 669, 683-84, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987).* Where Congress, pursuant to this authority, had established a parallel system of military discipline, the

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[8] While the majority pointedly notes that the Supreme Court has only agreed to extend a Bivens remedy three times since 1971, it has only rejected such claims based on special factors on three occasions over that same period. *See Wilkie v. Robbins, 551 U.S. 537, 554, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007); United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987); Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983).* In every other case, the Court has determined that the remedial scheme established by Congress displaces a judicial remedy -- a finding that the majority does not purport to make here. Moreover, even in *Chappell*, the Supreme Court relied in part on the alternative remedial scheme provided in the Uniform Code of Military Justice.

Court declined to interfere in the relationship between enlisted personnel and their commanding officers. *See Chappell, 462 U.S. at 304.* "Special factors," then, must be regarded as a prudential limitation: One that considers the suitability of money damages for the particular constitutional injuries alleged, together with the availability of other relief.[9] *See Davis, 442 U.S. at 245* (finding "special concerns" overcome by impossibility of equitable relief and appropriateness of damages remedy).

So limited, *Bivens* is an infrequent remedy, but it is a vitally necessary one. In laying out the *Bivens* remedy, the Supreme Court recognized that "[t]he very essence of civil liberty certainly consists

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[9] The special factors analysis considers the wisdom and effectiveness of one particular remedy -- the recovery of money damages from individual federal officers. This determination is separate and distinct from (1) a court's capacity to assess the right in question; and (2) its power to afford relief of any kind. In particular, if a court would be entitled to provide injunctive or habeas relief for the same or similar claims, it cannot treat the special factors analysis as a proxy for justiciability, the political question doctrine, or the separation of powers. Indeed, if other forms of relief would be available, these potential obstacles to the court's jurisdiction have already been dispatched and they may not be smuggled in a second time through the back door. Yet the majority does precisely this, relying on a host of "special factors" that simply repeat concerns accounted for elsewhere in our law. *See* **Maj. Op. at 38-50** (treating as special factors separation of powers, sovereign immunity, state secrets and classified information, and diplomatic assurances). In reality, it is a much more modest inquiry. The special factors analysis must focus on why money damages -- as opposed to other forms of available relief -- might be inappropriate or undesirable.

in the right of every individual to claim the protection of the laws." *Butz v. Economou, 438 U.S. 478, 485, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)* (quoting *Bivens, 403 U.S. at 395, 397*); *see also Davis, 442 U.S. at 241* ("[T]he judiciary is clearly discernible as the primary means through which these rights may be enforced."). It was this principle, in the face of "the most flagrant abuses of official power," that prompted the Court to afford a damages remedy. *Bivens, 403 U.S. at 410* (Harlan, J., concurring). *Bivens* thus reflects the courts' role as an independent source of protection, applying the damages remedy as a form of individual relief and official accountability.

This prerogative is consistent with the constitutional plan. With its built-in limitations, *Bivens* has never represented a formidable expansion of judicial power. [*622] The doctrine, it must be remembered, does not create any new rights; it provides a mechanism for enforcing existing constitutional rights when no other avenue exists. "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946)*; *see also Bivens, 403 U.S. at 395* ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

Against this backdrop, the majority sets out to narrow *Bivens* to the point of vanishing. The majority's test would not just eliminate a *Bivens* remedy in Arar's case, but in almost all cases. According to the majority, "'[h]esitation' is 'counseled' whenever thoughtful discretion would pause even to consider," and "no account is taken of countervailing factors." *See* **Maj. Op. at 37**. But because "thoughtful" people, by definition, always "pause to consider," this approach would foreclose a damages remedy on account of the most fleeting and superficial of concerns. And it would permit courts to ignore completely, as the majority opinion itself does, the gravity of the constitutional injuries alleged. As the Court admits, this dramatic recasting of *Bivens* is unnecessary to support its holding. ***Id.* at 38** (expressing the view that Arar's action "would have the natural tendency to affect diplomacy, foreign policy and the security of the nation," and therefore the Court's holding "need be no broader"). The standard described by the majority misstates the law and, for the reasons surveyed here, significantly weakens the courts' ability to redress constitutional injuries.

V

Arar's claims, in fact, go beyond the usual imperatives for a *Bivens* remedy. His complaint offers an exceptionally compelling basis for relief, one that the majority repeatedly sidesteps: The charge that government officials actively obstructed Arar's access to the courts, violating core procedural due process

rights. *See Tellier v. Fields, 280 F.3d 69 (2d Cir. 2000)* (assuming that a *Bivens* action exists for procedural due process claim by detainee). Any court should be deeply disturbed by such allegations, especially those backed by the factual detail presented here. *Cf. Valverde v. Stinson, 224 F.3d 129, 133-34 (2d Cir. 2000)* (finding AEDPA statute of limitations equitably tolled where prison officials intentionally obstructed habeas petitioner's ability to file his petition by confiscating his legal papers). Yet the majority's wholesale dismissal of claims relating to Arar's detention in the United States - for insufficient pleading, as described above -- allows it to avoid any meaningful engagement with these allegations.

Normally, as we have seen, when Congress legislates in a particular area, a *Bivens* action is not appropriate. In particular, the division of labor outlined in *Bivens* contemplated two scenarios: (1) Where Congress has selected a remedy for constitutional injuries, the courts should defer to its legislative wisdom; (2) Where Congress has not considered a remedy, however, a court must use its "judgment about the best way to implement a constitutional guarantee." *Wilkie, 551 U.S. at 550*; *see Bivens, 403 U.S. at 396-97.* However, Arar's case fits neither situation. Instead, the allegations are that any remedy provided by Congress and the Constitution was purposefully foreclosed by executive officials.

When it comes to torture, Congress has spoken loudly and clearly. *Title 18, Section 2441* [*623]

makes it a felony punishable by life imprisonment to commit, or conspire to commit, "an act specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control for the purpose of obtaining information or a confession." *See also 18 U.S.C. § 2340A*. Arar's transfer to Syria was allegedly designed to skirt the congressional prohibition on torture by outsourcing this form of interrogation. Moreover, in order to seamlessly accomplish this transfer, officials had to ignore or evade a number of other congressional dictates: An immigration policy that bars the removal of any person to a country where he will likely be tortured, and the INA's judicial review provision. *See* Convention Against Torture, December 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, *implemented by* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G., Tit. XXII, § 2242, 112 Stat. 2681-822 (codified at *8 U.S.C. § 1231*); *8 U.S.C. § 1252(a)(2)(D)*; *see also Tun v. INS, 445 F.3d 554, 566 (2d Cir. 2006)*. Finally, officials' actions also foreclosed Arar's opportunity to seek habeas relief under *28 U.S.C. § 2241* and the Constitution, a remedy that the government itself concedes should have been available to Arar.

In bare terms, the complaint alleges that executive officials set out to circumvent and undercut the powers of both the legislative and judicial branches. Under these circumstances, the usual justifications for hesitation in applying *Bivens* are simply not present. When, as here, the executive branch

takes measures incompatible with the express or implied will of Congress, its "power is at its lowest ebb." *Youngstown, 343 U.S. at 637 (1952)* (Jackson, J., concurring). Factors that might otherwise counsel hesitation disappear where executive officials have sought to nullify the remedies chosen by Congress. In these cases, courts owe the executive branch little deference. Instead, the courts' provision of a substitute remedy is an undertaking not simply "appropriate for a common-law tribunal" but essential for the rule of law. *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983).* Since the majority fails in these responsibilities, I respectfully dissent.

POOLER, Circuit Judge, joined by Judges Calabresi, Sack, and Parker, dissenting.

I agree with the well-reasoned dissents of my colleagues and join their opinions in full. I write separately to note that the majority's opinion in this troubling and unusual case should not be misread as adopting a new framework for determining whether to recognize a Bivens claim, and to explain why I do not agree that Arar's TVPA claim should be dismissed.

I. Bivens

At first glance, it might seem that the majority's reasoning with respect to Arar's Bivens claim proceeds in two simple steps: (1) Arar's claim presents a new context for a Bivens action,[1] and (2) special factors counsel hesitation before recognizing a Bivens remedy. But a closer reading of the majority opinion reveals far more than a mere hesitation to extend Bivens to a new context in light of special factors. Because the majority's holdings bear no relation to its new statements of Bivens principles, those remarks are dicta. Moreover, any such simplistic framework would be contrary to the Supreme Court's Bivens decisions, which require that courts consider [*624] reasons both for and against recognizing the remedy.

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[1] I do not agree with the majority's conclusion that Arar's case presents a new context for a Bivens action for the reasons stated in Judge Sack's dissent.

The Supreme Court has held that we must engage in the following analysis in considering whether to recognize Bivens action:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and free-standing remedy in damages. But even in the absence of an alternative, a Bivens remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Wilkie v. Robbins, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007) (quoting *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)).* After sidestepping the question of existing remedies, Maj. Op. at **33-36**, the majority states that the remainder of inquiry can be reduced to the question of whether there any special factors to consider. Id. at **35-36**

The majority begins by observing that the Supreme Court has extended Bivens twice but refused to extend Bivens seven times, as if this empirical disfavor could save courts the trouble of engaging in

"the kind of remedial determination that is appropriate for a common-law tribunal." *Wilkie, 551 U.S. at 550.*[2] Notwithstanding the Supreme Court's reluctance to extend Bivens in recent years, it has not overruled Bivens, nor has it overruled the decisions extending Bivens to new contexts in *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* and *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*, nor has it ever held that "Bivens and its progeny should be limited to the precise circumstances that they involved." *Wilkie, 551 U.S. at 568* (Thomas, J., concurring) (quotation marks omitted). Thus, the majority must distinguish Bivens, Davis, and Green's cases from Arar's.

To do so, the majority points to "special factors" that counsel hesitation. The majority observes, in dicta, two "principles" emerging from the case law on Bivens. First, where special factors counseling hesitation exist, "no account is taken of countervailing factors." Maj. Op. at **37**. Notwithstanding this new principle, the majority concludes that it "cannot ignore that, as the panel dissent put it, 'there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security.'" Id. at **56-57** (quoting *Arar v. Ashcroft, 532 F.3d 157, 213 (2d Cir. 2008)* (Sack, J., dissenting in part)). And the majority rec-

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[2] Recently, in dicta, the Supreme Court explained that its "reluctan[ce]" to extend Bivens stems from the fact that "implied causes of action are disfavored." *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009).*

ognizes that prudential considerations play into the Bivens analysis, considering, for example, whether a Bivens action in Arar's context would have a deterrent effect. Id. at 52. Ultimately, therefore, the majority has not adopted any new principle of disregarding countervailing factors.

Second, the majority proclaims that the threshold for determining whether a factor "'counsels hesitation' is remarkably low.'" Maj. Op. at 37. The majority explains that "'[h]esitation' is 'counseled' whenever thoughtful discretion would pause even to [*625] consider." Id. I find this statement somewhat inscrutable, but I do not take the majority to mean that Bivens should not be extended anytime a special factor deserves any degree of consideration. Insofar as the majority intends to lower the bar for special factors, its remarks are dicta. These remarks bear no relation to the majority's holding that extension of Bivens to Arar's context is not "advisable," id. at 32, because separation of powers, institutional competence, and other factors "sternly" counsel hesitation. Id. at 36. Indeed, the majority's opinion devotes twenty pages to its stern assessment of special factors, id. at 36-56, including the fear that "actual terrorists" could win damages awards, placing courts in the position of funding terrorism, id. at 53 n.12; that the government will be "graymail[ed]" into settling cases to prevent disclosure of classified information, id. at 51-54; and that other countries will be "less willing to cooperate with the United States in shar-

ing intelligence resources to counter terrorism," id. at 43.

Apart from being dicta, these remarks represent a misreading of Supreme Court precedent. Wilkie exhorts that we pay heed to special factors counseling hesitation while exercising the type of remedial judgment appropriate for a common law tribunal - "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done." *551 U.S. at 554* (citing *Bush, 462 U.S. at 378*). In the exercise of remedial judgment, we should not consider only those factors that militate in favor of one side of the argument. We must be mindful of a wide range of prudential concerns. See, e.g, *id. at 550* (holding that "any free-standing damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee"); *Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)* (considering whether extension of Bivens would "deter individual federal officers . . . from committing constitutional violations"). The majority cannot overrule Wilkie's holding that we must make "the kind of remedial determination that is appropriate for a common-law tribunal," *551 U.S. at 550*, by replacing that phrase with ellipses when quoting the case, see Maj. Op. at 35.

Were the majority's dicta the rule, there would be no explanation for the Supreme Court's decision

in Bivens in the first place. Surely there were special factors that would have counseled hesitation -- the drain on the public fisc, the strain on judicial resources, the hindrance to law enforcement personnel whose efforts had to be diverted to defending lawsuits for damages. Without pausing to consider these factors, the Bivens Court held that a damages remedy was necessary to enforce the *Fourth Amendment. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397-98, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).* Moreover, were the majority's dicta correct, it would be impossible to make heads or tails of *Davis v. Passman, supra.* In that case, the Court extended Bivens to a claim for employment discrimination in violation of the equal protection component of the *Fifth Amendment's Due Process Clause* against a member of Congress. The Court recognized a Bivens remedy despite pausing to give thoughtful consideration to the argument that Passman's status as a member of Congress, "counsel[ed] hesitation." *442 U.S. at 246.* The Court also noted the risk of "deluging federal courts with claims" and the scarcity of judicial resources, but did not find these special factors sufficiently persuasive to overwhelm Davis's need [*626] for a remedial mechanism. *Id. at 248* (quotation marks omitted).

The absence of other remedies for a constitutional violation may be a reason for creating a new cause of action. *Wilkie, 551 U.S. at 554* (considering, at the second step of the analysis, the inadequacy of existing remedies). Thus, the Supreme Court has

recognized a Bivens remedy where, for the plaintiff, it was "damages or nothing." *Davis, 442 U.S. at 245* (quoting *Bivens, 403 U.S. at 410* (Harlan, J., concurring in judgment)). "'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Bivens, 403 U.S. at 397* (quoting *Marbury v. Madison, 5 U.S. 137, 1 Cranch (5 U.S.) 137, 2 L. Ed. 60 (1803)).* "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id. at 392* (quoting *Bell v. Hood, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946)).* In Davis, the Court held, "unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *442 U.S. at 242.*

The majority "avoids any categorical ruling on alternative remedies," in favor of its "dominant holding" on special factors. Maj. Op. at 8.[3] I have

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[3] By abandoning the panel majority's holding that the INA is an alternative existing remedy that precludes Bivens relief, the majority has avoided any implication that well-established Bivens actions for immigrants alleging *Fourth* and *Eighth amendment* violations are without basis. And, by abandoning the holding that it could not take as true Arar's "unverified" allegations of official obstruction of his right to challenge

searched the majority's opinion for a subordinate and non-categorical ruling on alternative remedies, and I have found none. This is for good reason. The majority recognizes that "Arar has alleged that he was actively prevented from seeking any meaningful review and relief through the INA processes." Id. at 35. This makes Arar's case unlike those in which the Court refused to imply a Bivens remedy upon concluding that Congress had already established a remedial scheme covering the field. See, e.g., *Schweiker v. Chilicky, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*; *Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)*. Where defendants blocked a plaintiff's access to the remedies established by Congress, foreclosing a Bivens remedy eliminates any judicial review. See *Rauccio v. Frank, 750 F. Supp. 566, 571 (D. Conn. 1990)*; *Grichenko v. U.S. Postal Serv., 524 F. Supp. 672, 676-77 (E.D.N.Y. 1981)*. This result thwarts Congress's will and abdicates the judicial role. The majority errs in failing to take account of this consideration in its assessment of special factors.

In cases in which the Court declined to extend Bivens, it did not resolve the issue simply by observing that it had to pause to consider special factors. Rather, the Court declined to extend Bivens because factors related to institutional competence and separation of powers strongly counseled hesitation. For

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the CAT determination, the opinion avoids the implication that Bivens claimants face a heightened pleading standard.

example, in *Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)*, the Court declined to create a damages remedy for alleged racial discrimination by military officers because [*627] "[t]he need for . . . a special and exclusive system of military justice[] is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting," *id. at 300*, and the creation of a Bivens remedy by the federal courts "would be plainly inconsistent with Congress' authority in this field" under Article 1 of the Constitution, *id. at 304*.

Ultimately, the majority concludes that the Constitution provides Arar no remedy for this wrong, that the judiciary must stay its hand in enforcing the Constitution because untested national security concerns have been asserted by the Executive branch. For the reasons stated herein and in Judge Sack's dissenting opinion, I would hold the Arar should have a Bivens remedy -- to reinforce our system of checks and balances, to provide a deterrent, and to redress conduct that shocks the conscience. I understand the majority's opinion today to be a result of its hyperbolic and speculative assessment of the national security implications of recognizing Arar's Bivens action, its underestimation of the institutional competence of the judiciary, and its implicit failure to accept as true Arar's allegations that defendants blocked his access to judicial processes so that they could render him to Syria to be tortured,

conduct that shocks the conscience and disfigures fundamental constitutional principles. This is a hard case with unique circumstances. The majority's disappointing opinion should not be interpreted to change Bivens law.

II. TVPA

I cannot join the Court in concluding that the facts of Arar's complaint are insufficient to state a claim under the TVPA. Section 2(a) of the TVPA provides that a defendant is liable only if he acted under "actual or apparent authority, or color of law, of any foreign nation . . ." *28 U.S.C. 1350* (note). In construing this requirement, we look "to principles of agency law and to jurisprudence under *42 U.S.C. § 1983*." *Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)*. Under *Section 1983*, "[t]he traditional definition of acting under color of state law requires that the defendant . . . have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)* (quotation marks omitted).

I agree with the majority that there is no litmus test for determining whether a *Section 1983* defendant is acting under color of state law. Maj. Op. at 21 ("The determination as to whether a non-state party acts under color of state law requires an intensely fact-specific judgment unaided by rigid criteria as to whether particular conduct may be fairly

attributed to the state." (citing *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)).* This is a wise departure from the test set forth by the panel opinion, which interpreted *Section 1983* case law to require that when the defendant is a federal official, he must be under the "control or influence" of the state actor to act under color of state law. *Arar, 532 F.3d at 175-76.* Our Circuit has consistently recognized several bases for liability under *Section 1983*, "control or influence" being just one:

> For the purposes of *section 1983*, the actions of a nominally private entity are attributable to the state when: (1) the entity acts pursuant to the "coercive power" of the state or is "controlled" by the state ("the compulsion test"); (2) when the state provides "significant encouragement" [*628] to the entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies ("the joint action test" or "close nexus test"); or (3) when the entity "has been delegated a public function by the [s]tate," ("the public function test").

Sybalski v. Indep. Group Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) (per curiam) (quoting *Brentwood Acad., 531 U.S. at 296*). As the majority now recognizes, "[a] federal officer who conspires

with a state officer may act under color of state law." Maj. Op. at 21 (citing *Beechwood Restorative Care Ctr. v. Leeds, 436 F.3d 147, 154 (2d Cir. 2006)).*

The majority concludes that Arar's pleading was deficient because he alleged only that "United States officials encouraged and facilitated the exercise of power by Syrians in Syria," not that defendants possessed power under Syrian law which they used to remove him to Syria to be tortured. Maj. Op. at 21-22. I disagree. In the *Section 1983* context, the Supreme Court has held that private individuals may be liable for joint activities with state actors even where those private individuals had no official power under state law. *Dennis v. Sparks, 449 U.S. 24, 27-28, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).* In Sparks, the private individuals conspired with a state judge to enjoin the plaintiff's mining operation. The Court held:

> [T]o act 'under color of' state law for *§ 1983* purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of *§ 1983* actions.

Id.; see also *Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 315 (2d Cir. 2007)* (Korman, J., con-

curring in part). Arar alleges that U.S. officials, recognizing that Syrian law was more permissive of torture that U.S. law, contacted an agent in Syria to arrange to have Arar tortured under the authority of Syrian law. Specifically, Arar alleges that U.S. officials sent the Syrians a dossier containing questions, identical to those questions he was asked while detained in the U.S., including one about his relationship with a particular individual wanted for terrorism. He also alleges the Syrian officials supplied U.S. officials with information they extracted from him, citing a public statement by a Syrian official. Assuming the truth of these allegations, defendants' wrongdoing was only possible due to the latitude permitted under Syrian law and their joint action with Syrian authorities. The torture may fairly be attributed to Syria.

Because the majority's holding in this case is not required by controlling law from the *Section 1983* context,[4] the decision must turn on the unique features of this case - brought under the TVPA alleging joint action by federal agents with Syrian officials. The majority cites *Harbury v. Hayden, 444 F. Supp. 2d 19, 42-43 (D.D.C. 2006)*, aff'd on other grounds, *522 F.3d 413, 380 U.S. App. D.C. 388 (D.C. Cir. 2008)*. In that case, as well as one other, district judges concluded that U.S. officials pursuing federal

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[4] Because the majority's holding turns on the unique aspects of Arar's claim under the TVPA, it does not limit the range of conduct for which non-state actors can be held liable under *Section 1983*.

policy under federal statutes act under color of U.S., not foreign, law. Id. (holding that CIA officers cooperating with the Guatemalan military acted under color of U.S. law because they were "within the scope of [*629] their employment serving the United States" and "carrying out the policies and directives of the CIA"); *Schneider v. Kissinger, 310 F. Supp. 2d 251, 267 (D.D.C. 2004)* ("Dr. Kissinger was most assuredly acting pursuant to U.S. law . . . despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law."), aff'd on other grounds, *412 F.3d 190, 366 U.S. App. D.C. 408 (D.C. Cir. 2005)*. But the majority does not adopt this questionable reasoning -- that a federal official can act under color of only one sovereign's authority at a time. The majority simply observes that because "federal officials typically act under color of federal law, they are rarely deemed to have acted under color of state law." Maj. Op. at 21 (quotation marks omitted).

Rather, where the alleged torture was carried out by foreigners in a foreign land, the majority draws a line between the actual exercise of power under foreign law and the encouragement, facilitation, or solicitation of that exercise of power. Id. at 21-22. This distinction is unprincipled. Under agency law, "when two persons engage jointly in a partnership for some criminal objective, the law deems them agents for one another. Each is deemed to have authorized the acts and declarations of the other undertaken to carry out their joint objective." *United*

States v. Russo, 302 F.3d 37, 45 (2d Cir. 2002). It is of no matter that only one member of the conspiracy carried out the torture. If we carry the majority's logic to its extreme, federal agents "could never be responsible for torture inflicted under color of foreign law, even if they were in the room with the foreign torturers orchestrating the techniques." Arar Reply Br. at 36.[5]

Under *Section 1983*, non-state actors who willfully participate in joint action with state officials, acting under state law, themselves act under color of state law. By analogy, under the TVPA, non-Syrian actors who willfully participate in joint action with Syrian officials, acting under Syrian law, themselves act under color of Syrian law. In *Aldana v. Del Monte Fresh Produce, 416 F.3d 1242, 1249, 1265 (11th Cir. 2005)*, the Eleventh Circuit sustained a TVPA claim where plaintiffs alleged that a U.S. corporation "hir[ed] and direct[ed] its employees and/or agents," including a Guatemalan mayor, "to torture the Plaintiffs and threaten them with death." *416 F.3d at 1265*. The allegation that the corporation participated in joint action with the Guatemalan official

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[5] The majority's perplexing statement that if a federal official were found to be acting under color of foreign law, it "would render a U.S. official an official of a foreign government," Maj. Op. at 22-23 n.3, is simply incorrect. A private actor is not transformed into a state official merely because he acted under color of state law, see *Dennis, 449 U.S. at 27-28 (1980)*, and there is no reason that this would be the case in the analogous TVPA context.

was sufficient.[6] I see no principled reason to apply different rules to the TVPA context than the *Section 1983* context, to federal agent defendants than corporate defendants, or to actors in the United States than actors on foreign soil.[7] Arar alleges that defendants, [*630] acting in concert with Syrian officials, interrogated him through torture under color of Syrian law, which they could not have accomplished under color of U.S. law alone.

Thus, I cannot agree that the panel correctly determined the TVPA question on the "color of law" question.

I must therefore respectfully dissent.

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[6] Although the question in Aldana was whether violence by a private security force involved "state action," and not whether the U.S. corporation was acting in Guatemala under color of U.S. or Guatemalan law, in the *Section 1983* context, the two inquiries are interchangeable. See, e.g., *Lugar v. Edmondson Oil Co., 457 U.S. 922, 929, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)*; see also *Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1264 (11th Cir. 2009)*.

[7] Because plaintiffs must meet a plausibility standard for claims against federal officials under *Ashcroft v. Iqbal, supra*, I am not concerned that subjecting federal officials to liability under the TVPA would open the floodgates to a wave of meritless litigation. But see *Hayden, 444 F. Supp. 2d at 41*.

CALABRESI, Circuit Judge, joined by Judges Pooler, Sack, and Parker, dissenting.

I respectfully dissent. I join Judge Sack's, Judge Parker's, and Judge Pooler's dissenting opinions in full. But, because I believe that when the history of this distinguished court is written, today's majority decision will be viewed with dismay, I add a few words of my own, ". . . more in sorrow than in anger." *Hamlet*, act 1, sc. 2.

My colleagues have already provided ample reason to regret the path the majority has chosen. In its utter subservience to the executive branch, its distortion of *Bivens* doctrine, its unrealistic pleading standards, its misunderstanding of the TVPA and of § 1983, as well as in its persistent choice of broad dicta where narrow analysis would have sufficed, the majority opinion goes seriously astray. It does so, moreover, with the result that a person--whom we must assume (a) was totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under color of federal law--is effectively left without a U.S. remedy. *See especially* dissenting opinion of Judge Parker.

All this, as the other dissenters have powerfully demonstrated, is surely bad enough. I write to discuss one last failing, an unsoundness that, although it may not be the most significant to Maher Arar himself, is of signal importance to us as federal judges: the majority's unwavering willfulness. It has

engaged in what properly can be described as extraordinary judicial activism.[1] It has violated long-standing canons of restraint that properly must guide courts when they face complex and searing questions that involve potentially fundamental constitutional rights. It has reached out to decide an issue that should not have been resolved at this stage of Arar's case. Moreover, in doing this, the court has justified its holding with side comments (as to other fields of law such as torts) that are both sweeping and wrong. That the majority--made up of colleagues I greatly respect--has done all this with the best of intentions, and in the belief that its holding is necessary in a time of crisis, I do not doubt. But this does not alter my conviction that in calmer times, wise people will ask themselves: how could such able and worthy judges have done that?

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I focus first on the willful reaching out to decide a hard constitutional question. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we

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[1] I use this much abused phrase "judicial activism," in its literal sense, to mean the unnecessary reaching out to decide issues that need not be resolved, the violation of what Chief Justice Roberts called "the cardinal principle of judicial restraint--if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. U.S. DEA, 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (D.C. Cir. 2004)* (Roberts, J., concurring).

ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v.* [*631] *McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944)*. The Supreme Court long ago made clear that it would not--and that we should not--"pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. TVA, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936)* (Brandeis, J., concurring); *see also, e.g., Alexander v. Louisiana, 405 U.S. 625, 633, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972)* ("[W]e follow our usual custom of avoiding decision of constitutional issues unnecessary to the decision of the case before us."); *Burton v. United States, 196 U.S. 283, 295, 25 S. Ct. 243, 49 L. Ed. 482 (1905)* ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). We ourselves have described this canon of constitutional avoidance as "axiomatic," *Allstate Ins. Co. v. Serio, 261 F.3d 143, 149 (2d Cir. 2001)*, and have long allowed it to "dictate[]" our decisions in appropriate circumstances. *Fine v. City of New York, 529 F.2d 70, 76 (2d Cir. 1975)*.[2]

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[2] There is also a canon that courts should not lightly find legislation to be unconstitutional. *See, e.g., Clark v. Suarez Martinez, 543 U.S. 371, 381-82, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005)*. That canon is of great importance, and is related to but separate from the canon to which I am referring. *See id. at 381*. It derives from the so-called "majoritarian difficulty," the fact that courts are, generally, not representative bodies. *See* Alexander M. Bickel, *The Least Dangerous Branch* 16-17 (2d ed.

The question that today's majority elects to decide implicates this fundamental principle. This is because the existence *vel non* of a claim meriting a *Bivens* remedy, in the absence of any congressionally mandated relief, is a matter of constitutional interpretation. As early as *Bivens* itself, the Supreme Court made clear that the cause of action it recognized arose "under" the Constitution. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).* As Justice Harlan said in his influential concurrence in *Bivens*, "the source of the legal interest" protected by any *Bivens* action is "the Federal

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1986) ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people . . . .") The canon at issue in this case is different, however, and demands, more broadly, that unnecessary constitutional decisions not be made, *whichever way they would come out.* It is expressed in a large variety of rules, a few of which are listed in one Supreme Court decision:

> constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; *in advance of the necessity of deciding them*; in broader terms than are required by the precise facts to which the ruling is to be applied; *if the record presents some other ground upon which the case may be disposed of*; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided.

Rescue Army v. Mun. Court of Los Angeles, 331 U.S. 549, 569, 67 S. Ct. 1409, 91 L. Ed. 1666 (1947) (emphasis added).

Constitution itself"; "the Constitution is in the relevant sense a source of legal protection for the 'rights' enumerated therein." *Id. at 402 n.3* (Harlan, J., concurring). And even the majority here describes *Bivens* as "a judicially-created remedy *stemming directly from the Constitution itself.*" Maj. Op. at **30** (emphasis added).[3]

I recognize that this question--the constitutional status of *Bivens* actions--is one [*632] that has vexed some in academia. But as is often the case, what can be layered with mystery in the pages of a law review is, in practice, fairly simple. When a court concludes that a *Bivens* action is appropriate, it is holding that, on the then-present state of the law, the Constitution requires the court to create a remedy. As even the staunchest critics of *Bivens* recognize, a holding that a particular constitutional right implies a remedy "can presumably not even be repudiated by Congress." *Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)* (Scalia, J., concurring). While Congress can vitiate the need for a judicially created *Bivens* rem-

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[3] *Cf. Fine, 529 F.2d at 71, 76 (2d Cir. 1975)* (declining to decide the "difficult and troublesome constitutional questions" in a *Bivens-like* claim against a municipality "founded directly upon the *Fourteenth Amendment*"); *Brault v. Town of Milton, 527 F.2d 730, 738 (2d Cir. 1975)* (en banc) (assuming, without deciding, that a claim against a municipality "can be founded directly on the *Fourteenth Amendment*," but finding "discussion of other possible barriers on [the plaintiff's] road to relief . . . superfluous" because the allegations in the complaint were insufficient).

edy by providing an "alternative . . . process for protecting the [constitutional] interest," *Wilkie v. Robbins, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007)*,[4] it cannot overturn a holding that *some* remedy is necessary.[5] This is the essence of a

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[4] For this reason, were there a majority finding that Arar could bring a TVPA action, as Judge Pooler, in her dissenting opinion, powerfully argues he should be able to do, then of course there might well be an "alternative, existing process," *Wilkie, 551 U.S. at 550*, in which case a *Bivens* action might not lie under the well-established rule that such a remedial scheme may obviate the need for a *Bivens* action. Because of the majority's holding that the TVPA does not apply, however, I need not reach this question. A more complicated issue, which I also don't need to reach, is whether compensation by a *foreign* government can constitute an alternative redress, because of which, on the very particular facts of this case, a *Bivens* action might not lie. But no one has discussed or argued that in any way, and since it is not an easy issue, I see no need to delve into it further.

[5] The first step of the two-part analysis laid out in *Wilkie* is itself an instance of constitutional avoidance. Where a congressionally created process adequately protects a constitutional right, there is no need to determine whether the Constitution requires a remedy. *See Bush v. Lucas, 462 U.S. 367, 378 n.14, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)* ("We need not reach the question whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate." (citation omitted)).

By contrast, the Supreme Court, acting prudentially, has denied *Bivens* claims due to "special factors" only in quite particular circumstances implicating substantial constitutional questions. First, it has done so in response to an exclusive textual commitment of authority to another branch. *See United*

constitutional holding, and hence one directly subject to the avoidance canon.[6]

And while there are, of course, situations in which a court must or should put aside the practice of avoiding constitutional questions, as when its jurisdiction under Article III is in doubt, *see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*, none of them apply here. The existence *vel non* of a *Bivens* action is not a jurisdictional prerequisite that must be resolved first. If this was ever in doubt, it has been re-

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States v. Stanley, 483 U.S. 669, 681-82, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987) (holding that no *Bivens* action lay because of "explicit constitutional authorization for *Congress* 'to make Rules for the Government and Regulation of the land and naval Forces'" and "the insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon the political branches" (quoting *U.S. Const. Art. I, § 8, cl. 14*)); *Chappell v. Wallace, 462 U.S. 296, 300-02, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)* (same); *cf. Davis v. Passman, 442 U.S. 228, 246, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* ("[A]lthough a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the *Speech or Debate Clause*."). Second, it has done so where the Constitution did not provide a workable standard for distinguishing constitutional conduct from unconstitutional conduct. *See Wilkie, 551 U.S. at 555-61.*

[6] While the methodology that courts apply in determining whether or not a constitutional right presupposes some implied remedy is that of "a common-law tribunal," *Bush, 462 U.S. at 378*, that fact in no way diminishes the status of the ultimate holding, up or down, as a constitutional interpretation.

solved by *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009)*, which makes clear that a court can "assume, without deciding, that [a] claim is actionable under *Bivens*" and then dismiss a case on non-jurisdictional grounds.

That avoiding difficult constitutional questions like those before us is the proper [*633] course was made clear by the Supreme Court in *Christopher v. Harbury, 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)*. In that case, the only issue before the Supreme Court was whether Harbury's *Bivens* action for denial of access to courts could proceed. *Id. at 412*. Justice Souter (for eight members of the Court) wrote that whether this *Bivens* action lies would require an inquiry that raises

> concerns for the separation of powers in trenching on matters committed to the other branches. *Since the need to resolve such constitutional issues ought to be avoided where possible, the [courts] should . . . as soon as possible in the litigation [determine] whether a potential constitutional ruling may be obviated because the allegations of denied access fail to state a claim on which relief could be granted.*

Id. at 417 (emphasis added). The Court, in other words, said we must first decide if there are *non-Bivens* grounds for resolving the dispute, and only

then address the constitutional issues raised by *Bivens* actions.[7] This practice, the Court stated, comports with "the obligation of the Judicial Branch to avoid deciding constitutional issues needlessly." *Id.* The Court then proceeded to examine closely the cause of action that Harbury claimed to have lost through the defendants' behavior, determined that it was insufficient to justify relief, and, on that non-constitutional basis, dismissed Harbury's claim. *Id. at 418.*

The implications for Arar's case could hardly be more manifest. The national security concerns that the majority relies upon in its special factors analysis are precisely those that the Supreme Court said must be avoided in *Harbury*. And in such circumstances, it is our job to put "the trial court . . . in a position as soon as possible in the litigation to know whether a potential constitutional ruling may be obviated." *Id. at 417.* For reasons that will be clear soon enough, it may well be that, on remand, this case would, for non-constitutional reasons, "fail to state a claim on which relief could be granted." *Id.*

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[7] To be sure, the Supreme Court noted that the defendants in *Harbury* "did not challenge below the existence of a cause of action under *Bivens*," and accordingly it did not express an opinion on the question or use the "special factors" terminology. *Harbury, 536 U.S. at 412 n.6.* But the constitutional question before us, of the balancing of two constitutional interests, one an individual right and one a matter of national security and separation of powers, is the same one as was avoided in *Harbury*.

at 417. That being so, the Supreme Court has told us, we must avoid constitutional pronouncements.

For this Court to go out of its way to decide on *Bivens* grounds when it is not necessary is, therefore, a reaching out of a particularly dangerous sort, regardless of what conclusion the Court comes to on the [*634] *Bivens* question.[8] If--as I would if I had to face the question--we were to decide that *Bivens* applies, then some remedy would be necessary regardless of Congress's preference. If, as the majority chooses to do, we rule that *Bivens* does not apply, we have said that, in a wide variety of cases, the Constitution fails to give protection. Both positions require a parsing of the Great Charter. When such a decision cannot be avoided, so be it: we do our job. But where it can be avoided, it should be.

The fact that the majority *wishes* to call the propositions holding is instructive, however. If the propositions are *holding* then they would eliminate virtually all *Bivens* actions in this circuit. And they would do so despite the assertions, elsewhere in the

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[8] At footnote 7, the majority disputes Judge Pooler's statement that the propositions in the accompanying text are dicta. *See* Maj. Op. at **37**. The majority then seeks to characterize those propositions as holdings. But whether something is holding or dicta is an objective fact and does not depend on how it is characterized either by a majority or by a dissent. It is what it is regardless of what one calls it. To paraphrase my professor Fleming James, "You can call it Thucydides or you can call it mustard plaster, but it is [dicta or holding] just the same."

majority opinion, that recognizing a *Bivens* action in this extraordinary case would be uniquely dangerous. The majority's desire to make a "holding" of such breadth, as to a question entailing constitutional interpretation, in a case which, as I argue, could likely be resolved on other grounds, displays a truly extraordinary degree of willfulness and activism.

II

So, how might the *Bivens* issue have been avoided? As Judge Sack explains in his eloquent dissent, this might be done through first examining the significance of the state secrets privilege to this case.[9] That privilege has long required dismissal in those rare cases where national security interests so drastically limit the evidence that can be introduced as to deprive either a plaintiff or a defendant of an opportunity to make its case. *See, e.g., Zuckerbraun*

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[9] At footnote 14, the majority states that the state secrets privilege, despite its common law origin, is not devoid of constitutional implications. *See* Maj. Op. at 58-59. That may well be. But that fact in no way means that decisions as to the applicability of a particular claim of the privilege entail constitutional interpretations. The existing common law privilege more than covers whatever the Constitution requires. The proper analogy is quite simple. If Congress were to pass a statute, akin to *§ 1983*, giving broad cause of action to those injured by federal officials, decisions under that statute would not normally involve constitutional interpretations. And this would be so even though, in the absence of such a statute, a *Bivens*, constitutional claim, might lie. The same is so with respect to applications of the common law state secrets privilege. As an excuse for the majority's violation of the canon of constitutional avoidance this argument does not make it to first base.

v. Gen. Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991); see also United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953); El-Masri v. United States, 479 F.3d 296, 308 (4th Cir. 2007) ("[A] proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."). In a case such as this, where the Government asserts that the plaintiff's claim implicates vital national secrets, we must, before we move to the merits, examine the consequences of our duty to guard against any potentially harmful disclosures.

The majority obviously shares our concerns about the protection of state secrets, as virtually every "special factor" identified in the majority opinion concerns classified [*635] material. But, as Judge Sack says, this amounts to double-counting of the Government's interest in preserving state secrets. *See* dissenting opinion of Judge Sack at 52. We *already* possess a well-established method for protecting secrets, one that is more than adequate to meet the majority's concern.[10] Denying a *Bivens* remedy because state secrets might be revealed is a bit

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[10] Indeed, if anything, existing doctrine may be *too* solicitous of the need for secrecy, if the many critics of the *Reynolds* line are correct. *See infra* Part IV. But while there is widespread concern that the doctrine may be overused, it is hard to find any commentators who think that state secrets are inadequately protected under current law.

like denying a criminal trial for fear that a juror might be intimidated: it allows a risk, that the law is already at great pains to eliminate, to negate entirely substantial rights and procedures.

Even more mystifying is the majority's insistence that it is respecting "[t]he preference for open rather than clandestine court proceedings." Maj. Op. at 47. How, exactly, does the majority promote openness by shaping a constitutional decision around the fact that state secrets might be involved in a claim? The state secrets doctrine is undoubtedly in tension with the public right of access to the courts, but the majority's approach is more opaque than any state secrets resolution. When a court properly applies the state secrets doctrine, the case at bar will proceed only if the alleged state secrets are not vital to a claim or defense, so there should be little fear that a substantive holding will ultimately turn on secret material. By contrast, consider the harm done to the openness of the court system by what the majority does here. It bars any action in the face of what we are required to assume are outrageous constitutional violations, and it does so simply because state secrets *might possibly* be involved, without having a court look into that very question. As a result, even if the Government's claimed need for secrecy turned out to be wholly illusory, there would be no recourse! Indeed, even if the Government declassified every document relating to this case, even if all four countries involved announced that they had nothing to hide and that Arar's claim should proceed so that

they could be exonerated, there would be no open judicial testing of Arar's allegations. Which approach should give us more cause to hesitate?

The majority further errs in its use and abuse of other fields of law. In trying to find "special factors" that could justify barring a *Bivens* claim (but do not depend on "state secrets") the majority points to two issues that arise in *every* tort suit against a government official. If they are valid here they would appear to counsel "hesitation" in (and, under the majority's reasoning, seemingly preclude) every *Bivens* action. First, the majority warns that "[t]he risk of graymail . . . counsels hesitation in creating a *Bivens* remedy." Maj. Op. at 51. Because the risk of unwarranted and dangerous disclosure is so high, the Government will be pressured into settling meritless cases. Second, as a consequence of such graymail, the Government, rather than individual defendants, would wind up paying off claims. *See* Maj. Op. at 52. Because these possibilities are "an endemic risk in cases (however few) which involve a claim like Arar's," the majority concludes, they make *Bivens* actions particularly inappropriate. Maj. Op. at 51.

But both of these issues--the risk of graymail and the disjunction between individual defendants and an indemnifying government--are present in *every* tort suit against a government agent, not just the [*636] relatively "few" cases involving extraordi-

nary rendition for the purposes of torture.[11] Taking the latter point first, both state and federal officers are almost universally indemnified by the State if they lose tort suits. In *Bivens* cases, the federal government "indemnifies its employees against constitutional tort judgments or settlements (in the rare instances in which a *Bivens* claim results in a monetary liability) and takes responsibility for litigating such suits." Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens, 88 Geo. L.J. 65, 76 (1999).* Indeed, "[a]s a practical matter . . . indemnification is a virtual certainty." *Id. at 77.* Similarly, as is widely understood,"a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment. So far as can be assessed, this is true not occasionally and haphazardly but pervasively and dependably." John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 50 (1998)* (citation omitted). So the majority's point proves far too much: if a *Bivens* action is inappropriate where the individual defendants' pocketbooks are not ultimately at risk, then *Bivens* actions are *always* inappropriate. And while the majority could be right that, as a policy matter, tort suits against financially indifferent defendants are unwise, who are we as federal appellate judges to say

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[11] That is, except to the extent "state secrets" are involved. And to the extent they are, as already discussed, the state secrets privilege is more than sufficient to preclude graymail.

that *what is standard tort law in every state in the nation*, and what has been repeatedly approved by the Supreme Court and every federal circuit, *is fatally unacceptable.*

As to graymail, defendants in civil suits are always subject to pressures to settle, yet this has never been considered a reason to bar categorically a type of suit against government officials. Is the desire to avoid the revelation of state secrets (a desire that is already fully accommodated by the state secrets doctrine) so different from the desire to avoid, for example, devastating reputational injury, which will often drive a state or federal entity's response to a suit? How is the hassle attendant on a claim like Arar's--the "enmesh[ing of] government lawyers" and the "elicit[ing of] government funds for settlement," Maj. Op. at 39--so much worse here than it is in the types of suits that every state has chosen to permit and that all three branches of the federal Government have accepted since *Bivens* was issued almost 40 years ago?[12]

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[12] On the subject of graymail, something must be said in response to the majority's remarkable insinuation that Canada has been the victim of graymail at Arar's hands. Maj. Op. at 53-54. ("It is not for nothing that Canada (the government, not an individual officer of it) paid Arar $ 10 million dollars."). The Canadian government decided on its own accord to initiate an inquiry into its role in Arar's treatment, an investigation that operated independently of Arar's suits. That inquiry was "specifically precluded from making any findings (or even assessments) as to whether the Government of Canada would be civilly liable to Mr. Arar." *Report of the Events Relating to Maher Arar: Analysis & Recommendations*, Commission of Inquiry into

[*637] These, then, are the majority's determinative "special factors": a mix of risks that are amply addressed by the state secrets doctrine and policy concerns that inhere in all *Bivens* actions and in innumerable every-day tort actions as well.[13] This maladaptation of a *Bivens* analysis, as far as I can tell, is motivated by a belief that the majority's hold-

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the Actions of Canadian Officials in Relation to Maher Arar 362 (Sept. 18, 2006). It had no power to recommend payment, but instead just expressed the facts surrounding Arar's treatment, spelling out Canada's conduct vis-a-vis Arar in hundreds of pages of detail. The Canadian government considered that report and decided to compensate and apologize to Arar. In other words, Canada voluntarily established a commission the entire purpose of which was to determine and discuss publicly what the Canadian government did to Arar; it then assessed those facts and concluded that it should negotiate a settlement with him and formally apologize for the role of Canadian officials. Many lessons could be drawn from this process for the American response to allegations like Arar's, but one thing quite clearly cannot be said: that what happened in Canada is tantamount to graymail.

[13] My fellow dissenters have said all that needs to be said about the majority's insistence that Arar's action is "a constitutional challenge to policies promulgated by the executive" and that *Bivens* actions cannot proceed where they "affect diplomacy, foreign policy and the security of the nation." Maj. Op. at 38. And as to the ominous-sounding warning that "[s]uch a suit unavoidably influences government policy" and "invades government interests," Maj. Op. at 39, I would not think that an unconstitutional course of government action is shielded from scrutiny merely because it can be described as a "policy" or "interest." If the DEA had a "policy" of conducting warrantless home searches, would we hesitate to influence it? *See Bivens, 403 U.S. at 389-90.* If corrections officials acted on an "interest" in denying their inmates medical care, would we hesitate to invade it? *See Carlson v. Green, 446 U.S. 14, 16, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).*

ing is necessary to protect our nation's security. But, as I have already said, that worthy concern both can be and should be protected by already existing ordinary law and not by reaching out and potentially warping the Constitution.

III

The state secrets doctrine has recently come in for significant criticism, much of it warranted. In particular, many commentators--not to mention the Obama administration and a Ninth Circuit panel--have suggested that outright dismissal of a case on state secrets grounds should be disfavored. *See, e.g., Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1006 (9th Cir. 2009), amended at 579 F.3d 943, reh'g en banc granted by No. 08-15693, 586 F.3d 1108, 2009 U.S. App. LEXIS 23595*; *Policies and Procedures Governing Invocation of the State Secrets Privilege*, Memorandum from the Attorney Gen. to Heads of Exec. Dep'ts and Agencies (Sept. 23, 2009), *available at* http://www.usdoj.gov/opa/documents/state-secret-priviliges.pdf. There is much to these concerns. But I would note three reasons that a threshold dismissal for want of evidence due to the existence of state secrets (if that were eventually determined necessary) would be preferable to the constitutional holding made today. And this would be so, I suggest, quite apart from the importance of adhering to the canon of constitutional avoidance.

First, a dismissal because a party simply cannot (for reasons of state secrets) proffer necessary evidence says nothing about the merits of the underlying claim.[14] While this may be deeply unfair to a party who has been grievously injured (as we must assume Arar was), it, at least, does no damage to the legal standards by which other parties' claims are judged.

Second, a routine practice of first considering state secrets avoids the risk of a certain type of Government gamesmanship. If the Government has the option of seeking a state secrets dismissal both before *and* after a decision on some open question, then it has the ability to moot unfavorable rulings. Consider the strategy [*638] in this case. The Government's initial filing before the District Court sought a state secrets dismissal. In its brief for this *en banc* hearing, however, *after* it had won a favorable substantive ruling from the District Court and the panel, the Government did not mention any interest in a remand for a state secrets dismissal.[15] It seems more than likely that, had the District Court or the panel found *against* the Government on the *Bivens*

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[14] The fact that a claim involves an open and plausible constitutional question should be no bar to a state secrets ruling. As in *Iqbal*, a court can simply "assume, without deciding, that [plaintiff's *Bivens*] claim is actionable" and determine whether a case must be dismissed even on the legal theory most favorable to the plaintiff. *Iqbal, 129 S. Ct. at 1948.*

[15] At oral argument, however, the Government did indicate that it could accept such a remand.

question, the Government would be arguing to us that the opinion below should be vacated pending a state secrets determination. To be sure, a party has no obligation to fire all of its guns at once when a single argument can shoot a claim down. And I do not mean to imply any devious motive on the part of the Government in this case in particular. But there is no reason to structure our law to facilitate such conduct.

Third, and most important, a holding that Arar, *even if all of his allegations are true*, has suffered no remediable constitutional harm *legitimates* the Government's actions in a way that a state secrets dismissal would not. The conduct that Arar alleges is repugnant, but the majority signals--whether it intends to or not--that it is not *constitutionally* repugnant. Indeed, the majority expressly states that the legal significance of the conduct Arar alleges is a matter that should be left entirely to congressional whim. *See* Maj. Op. at **56-57**. While a state secrets dismissal would similarly move the locus of redress to the political branches, it would do so not by holding that the harm done to Arar is of no concern to the judiciary or to the Constitution. It would do so, instead, by acknowledging an institutional limitation--due to the presence of state secrets--that is independent of the merits of Arar's claim and would, thereby, invite other branches to look into those possible merits.

This leads to my final point. Whether extraordinary rendition is constitutionally permissible is a question that seems to divide our country. It seems to me obvious, however, that regardless of the propriety of such renditions, an issue on which I won't hide my strong feelings, mistakes *will* be made in its operation. And *more* obvious still is that a civilized polity, when it errs, admits it and seeks to give redress. In some countries, this occurs through a royal commission. In the United States, for better or worse, courts are, almost universally, involved. This being so, and regardless of whether the Constitution itself requires that there be such redress, the object must be to create and use judicial structures that *facilitate* the giving of compensation, at least to innocent victims, while protecting from disclosure those facts that cannot be revealed without endangering national security. That might well occur here through the application of a sophisticated state secrets doctrine.[16] It [*639] does not occur when, at the

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[16] Consider the closing remarks of Judge Ellis in his state secrets dismissal of Khaled El-Masri's similar allegations:

> It is important to emphasize that the result reached here is required by settled, controlling law. It is in no way an adjudication of, or comment on, the merit or lack of merit of El-Masri's complaint. . . . [P]utting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a

outset, Arar's claims--though assumed true and constitutionally significant--are treated as lacking any remedy. And this is just what today's unfortunate holding does. It hampers an admission of error, if error occurred; it decides constitutional questions that should be avoided; it is, I submit, on all counts, utterly wrong. I therefore must regretfully, but emphatically, dissent.

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result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.

El-Masri v. Tenet, 437 F. Supp. 2d 530, 540-41 (E.D. Va. 2006).

APPENDIX B - ENTERED June 30, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 06-4216-cv

532 F.3d 157

November 9, 2007, Argued
June 30, 2008, Decided

MAHER ARAR,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, formerly Attorney General of the United States; LARRY D. THOMPSON, formerly Deputy Attorney General; TOM RIDGE, as Secretary of State of Homeland Security; J. SCOTT BLACKMAN, as Regional Director of the Regional Office of Immigration and Naturalization Services; PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement; EDWARD J. MCELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now Customs Enforcement; ROBERT MUELLER, Director of the Federal

Bureau of Investigation; JOHN DOE 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents; JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services; UNITED STATES OF AMERICA,

Defendants-Appellees.

Before: MCLAUGHLIN, CABRANES, and SACK, *Circuit Judges*.

Plaintiff, a dual citizen of Syria and Canada, who alleges that he was mistreated by U.S. officials in the United States and removed to Syria with the knowledge or intention that Syrian authorities would interrogate him under torture, brought an action against the United States and various U.S. officials pursuant to the Torture Victim Protection Act, 28 U.S.C. § 1350 note ("TVPA"), and the Fifth Amendment to the U.S. Constitution. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and several of the individual defendants also moved to dismiss the complaint for lack of personal jurisdiction. In addition, the United States asserted the state-secrets privilege with respect to information at the core of plaintiff's claims. The United States District Court for the Eastern

District of New York (David G. Trager, *Judge*) granted defendants' motion to dismiss without reaching the issues raised by the assertionof the state-secrets privilege by the United States. We likewise evaluate the claims presented under applicable law and because those claims do not survive that review, we do not consider whether the assertion of the state-secrets privilege by the United States compels the dismissal of this action; nor need we determine on this appeal whether, as defendants contend, the Immigration and Nationality Act forecloses the litigation in federal district court of plaintiff's removal-related claims. With respect to the other jurisdictional questions raised on this appeal, we conclude that (1) the allegations set forth in plaintiff's complaint are sufficient, at this early stage of the litigation, to establish personal jurisdiction over defendants not resident in New York, but (2) plaintiff has not established federal subject matter jurisdiction over his claim for declaratory relief. Furthermore, we hold that (3) plaintiff's allegations do not state a claim against defendants for damages under the TVPA and (4) in light of the determinations of Congress and precedents of the Supreme Court and our Court, we cannot judicially create a cause of action for damages under the Fifth Amendment, for Arar, pursuant to the doctrine of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Affirmed. Judge Sack concurs in part and dissents in part in a separate opinion.

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[*162] JOSE A. CABRANES, *Circuit Judge.*

On September 26, 2002, plaintiff-appellant Maher Arar, a dual citizen of Syria and Canada, and the subject of a U.S. government "lookout," J.A. 88, was detained by U.S. authorities at John F. Kennedy International airport in New York City ("JFK Airport") while en route from Tunisia to Montreal. On October 7, 2002, J. Scott Blackman, then the U.S. Immigration and Naturalization Service ("INS") Regional Director for the Eastern Region, determined, based on a review of classified and unclassified information, that Arar was a member of Al Qaeda and therefore inadmissible to the United States. Pursuant to this determination, Blackman signed an order authorizing Arar to be removed to Syria "without further inquiry before an immigration judge, in accordance with [*8 U.S.C. § 1225(c)(2)(B)* and *8 C.F.R. § 235.8(b)*]." *Id.* at 86.

In February 2004, the Canadian Government convened an official commission ("the Commission") to look into "the actions of Canadian officials in relation to" Arar's detention in the United States, his eventual removal to Syria, and his subsequent detention by Syrian authorities. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Analysis and Recommendations 11-12 (2006) ("Canadian Commission, Analysis and Recommendations") (describing the scope of the inquiry). The Commission determined that Canadian officials had "requested" that American authorities create lookouts for Arar and his wife, had described Arar to American authorities as an "Islamic Extremist individual[] suspected of being linked to the Al Qaeda terrorist movement," and had provided American authorities with information derived from their investigations of Arar. *Id.* at 13. The Commission further determined that "[i]t [wa]s very likely that, in making the decisions to detain and remove Mr. Arar, American authorities relied on information about Mr. Arar provided by the [Royal Canadian Mounted Police]." *Id.* at 14. Accordingly, the Commission recommended that Canadian authorities consider granting Arar's request for compensation from the Canadian government. *Id.* at 369. In January 2007, the Canadian government entered into a settlement agreement with Arar, whereby he received compensation of 11.5 million Canadian dollars (approximately $9.75 million, at the time) in exchange for withdrawing a lawsuit against the Canadian government. *See* Ian Austen, *Canada Will Pay*

$9.75 Million to Man Sent to Syria and Tortured, N.Y. Times, Jan. 27, 2007, at A5.[1]

On January 22, 2004, shortly before the initiation of the Canadian inquiry, Arar filed this civil action against Blackman, former U.S. Attorney General John Ashcroft, FBI Director Robert Mueller, former Acting Attorney General Larry D. Thompson, former INS Commissioner James W. Ziglar, INS District Director Edward J. McElroy, the Secretary of Homeland Security, the Regional Director [*163] of Immigration and Customs Enforcement for the New York Region, and several unnamed employees of the FBI and INS.[2] Arar alleges that these individuals mistreated him while he was in the United States and then removed him to Syria with the knowledge or intention that he would be detained and tortured there.

Count one of Arar's complaint requests relief under the Torture Victim Protection Act, *28 U.S.C. §*

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[1] We do not adopt or otherwise endorse the findings of the Commission. Our reference to the existence of these findings is consistent with our order of October 23, 2007, in which we granted Arar's motion to take judicial notice of the existence of the report and scope of its contents but declined to take judicial notice of the findings set forth therein.

[2] Arar sues Thompson, Ziglar, Blackman, McElroy and the Doe defendants in their individual capacities. He sues Ashcroft and Mueller in both their individual and official capacities His complaint names the Secretary of Homeland Security and the Regional Director of Immigration and Customs Enforcement in their official capacities only.

1350 note ("TVPA"). Counts two and three request relief under the *Fifth Amendment to the U.S. Constitution* for Arar's alleged torture (Count two) and detention (Count three) in Syria. Count four requests relief under the *Fifth Amendment to the U.S. Constitution* for events alleged to have occurred while Arar was detained in the United States. With respect to relief, Arar seeks a declaratory judgment that defendants' conduct violated his "constitutional, civil, and international human rights," as well as compensatory and punitive damages for the statutory and constitutional violations alleged in the complaint. Compl. 24.

In a memorandum and order dated February 16, 2006, the United States District Court for the Eastern District of New York (David G. Trager, *Judge)* dismissed Counts one through three of Arar's suit, pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, for failure to state a claim upon which relief can be granted. *See Arar v. Ashcroft, 414 F. Supp. 2d 250, 287-88 (E.D.N.Y. 2006)*. The District Court dismissed Count four without prejudice, pursuant to *Rule 12(b)(2)*, for lack of personal jurisdiction over the individual defendants. Upon receiving notice that Arar had elected not to amend his complaint to cure the jurisdictional defects found by the District Court, the Clerk of Court entered judgment dismissing the action with prejudice on August 17, 2006. Arar now brings this appeal.

Arar's suit implicates several questions of first impression for our Court. One threshold question presented on this appeal is whether, as defendants contend, the Immigration and Nationality Act ("INA"), *8 U.S.C. § 1101 et seq.* deprived the District Court of subject matter jurisdiction over the claims raised in Counts two and three of Arar's complaint. The adjudication of this question is, for the reasons set forth below, *see infra* at 169-73, particularly difficult in light of the record before us. However, because we are compelled to dismiss these claims on the basis of other threshold--that is, non-merits--grounds, we need not determine whether the INA did, in fact, strip the District Court of subject matter jurisdiction to hear Arar's removal-related claims.

We must therefore determine (1) whether the district court had personal jurisdiction over the individual defendants; (2) whether Arar's allegation that U.S. officials conspired with Syrian authorities to torture him states a claim against the U.S. officials under the TVPA; (3) whether to create a judicial damages remedy, pursuant to *Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, for Arar's claims that U.S. officials (a) removed him to Syria with the knowledge or intention that he would be detained and tortured there and (b) mistreated him while he was detained in the United States; and finally, (4) whether Arar may seek a declaratory judgment that defendants' actions violated his constitutional rights.

For the reasons that follow, we conclude that under the precedents of the Supreme Court and our Court: (1) Arar has made a [*164] *prima facie* showing sufficient to establish personal jurisdiction over Thompson, Ashcroft, and Mueller at this early stage of the litigation; (2) Count one of Arar's complaint must be dismissed because Arar's allegations regarding his removal to Syria do not state a claim against defendants under the TVPA; (3) Counts two and three of Arar's complaint, which envisage the judicial creation of a cause of action pursuant to the doctrine of *Bivens,* must also be dismissed because (a) the remedial scheme established by Congress is sufficient to cause us to refrain from creating a free standing damages remedy for Arar's removal-related claims; and (b) assuming for the sake of the argument that the existence of a remedial scheme established by Congress was insufficient to convince us, "special factors" of the kind identified by the Supreme Court in its *Bivens* jurisprudence counsel against the judicial creation of a damages remedy for claims arising from Arar's removal to Syria; (4) Count four of Arar's complaint must be dismissed because Arar's allegations about the mistreatment he suffered while in the United States do not state a claim against defendants under the *Due Process Clause of the Fifth Amendment*; and (5) Arar has not adequately established federal subject matter jurisdiction over his request for a judgment declaring that defendants acted illegally by removing him to Syria so that Syrian authorities could interrogate him under torture.

In the circumstances presented, we need not consider the issues raised by the assertion of the state-secrets privilege by the United States--particularly, whether the exclusion of information pursuant to the privilege might result in the dismissal of certain of Arar's claims.

We do not doubt that if Congress were so inclined, it could exercise its powers under the Constitution to authorize a cause of action for money damages to redress the type of claims asserted by Arar in this action. The fact remains, however, that Congress has not done so. Instead, it has chosen to establish a remedial process that does not include a cause of action for damages against U.S. officials for injuries arising from the exercise of their discretionary authority to remove inadmissible aliens. We are not free to be indifferent to the determinations of Congress, or to ignore the Supreme Court's instructions to exercise great caution when considering whether to devise new and heretofore unknown, causes of action.

Judge Sack concurs in part and dissents in part. Specifically, Judge Sack agrees with the majority that (1) Arar has made a *prima facie* showing sufficient to establish personal jurisdiction over Thompson, Ashcroft, and Mueller; (2) Arar's allegations regarding his removal to Syria do not state a claim against defendants under the TVPA; and (3) Arar has not adequately established federal subject matter jurisdiction over his request for a judgment de-

claring that defendants acted illegally by removing him to Syria so that Syrian authorities could interrogate him under torture.

Unlike the majority, however, judge Sack would accept Arar's invitation to judicially create a new *Bivens* remedy and would permit Arar's claims for monetary damages to go forward based on his view that (1) the context giving rise to Counts two and three of Arar's complaint--the detention and deportation of a suspected terrorist pursuant to the discretion conferred on the Attorney General--raises no "'special factors' counsel[ing] against the application of *Bivens," see* Dissent 212; and (2) the constitutional rights that Arar's complaint invokes are sufficiently broad and "clear" that Arar may state a *Bivens* claim based on the conditions of his detention [*165] within the United States, *see id.*at 215. The analysis by which judge Sack reaches these conclusions is, in our view, undermined by contradictory assertions and misstatements of the law. We highlight three prominent examples here. First, Judge Sack's opinion does not grapple with the complicated legal questions arising from the extraterritorial application of the U.S. Constitution: it casts the challenged actions "as perpetrated by U.S. agents entirely within the United States," *id.*at **[48 at n.33]**, but then looks to Arar's alleged torture by *Syrian authorities in Syria* as the basis for Arar's *Fifth Amendment* claim, *id.* at **[29-30]** (observing that "interrogation by torture" undoubtedly "shocks the conscience" and that "whether the defendants violated

Arar's *Fifth Amendment* rights" does not turn on *who Arar claims* committed the torture or *where Arar claims* the torture took place). Second, despite recognizing that Arar's *Fifth Amendment* claim is based on allegations that Arar was *removed from the United States in order to be tortured in Syria,* Judge Sack nevertheless concludes that Arar's suit involves no "questions of law and fact ... arising from any action taken or proceeding brought *to remove an alien from the United States," 8 U.S.C. § 1252(b)(9)* (emphasis added)--thereby avoiding the difficult question of whether *§ 1252(b)(9)* stripped the District Court of subject matter jurisdiction to hear Arar's removal-related claims. *See* Dissent **[45 n. 31]**. Third, Judge Sack takes the position that "[t]he assessment of Arar's alleged complaint must take into account the entire arc of factual allegations that Arar makes," *id.*at [27], but criticizes the majority for considering, when evaluating Arar's *Bivens* claim, "the *fact-specific* 'context' of Arar's treatment," *id.* at **[40]**.

Such is the freedom enjoyed by the writer of a dissenting opinion. Those charged with rendering decisions that carry the force of law have no such freedom, however. Our task is to deliver a reasoned opinion that conforms to the precedents of the Supreme Court and our Court; we have done so here. We agree, of course, with judge Sack's view that threats to the nation's security do not allow us to jettison principles of "simple justice and fair dealing." *Id.* at **[55]** But these parlous times of national challenge can no more expand the powers of the judiciary

than they can contract the rights of individuals. The creation of civil damage claims is quintessentially a legislative function, and the protection of national security and the conduct of foreign affairs are primarily executive. Whatever the emotive force of the dissent's characterization of the complaint, we cannot disfigure the judicial function to satisfy personal indignation.

I. Background

A. Facts alleged

Arar's complaint, which is unverified,[3] sets forth the following relevant factual allegations. On September 26, 2002, U.S. immigration officials detained Arar at JFK Airport while he was transferring flights on his way from Tunisia to Montreal. He remained in U.S. custody for twelve days. For most of this time, he was held at the Metropolitan Detention Center ("MDC") in Brooklyn, NY. Arar claims that on the evening of September 26, he was "placed [*166] in solitary confinement" in a room with no bed and with lights that were left on all night. Compl. P 32. On the morning of September 27, he was alleg-

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[3] Judge Sack characterizes "[t]he fact that Arar did not choose to verify his complaint ... [as] irrelevant." Dissent **[2 n.3]** As set forth below, this fact determines whether the complaint itself may serve as evidence in support of the allegations made therein--an issue that, in turn, bears on whether the INA's jurisdiction-stripping provisions deprived the District Court of subject matter jurisdiction over Arar's removal-related claims. *See infra* **[18-20]**

edly questioned by FBI agents who ignored his requests to see a lawyer or make a telephone call. Arar alleges that his requests to see a lawyer or make a telephone call were also ignored between September 27 and October 1.

On October 1, Arar was presented with a document stating that the INS had determined that he was a member of Al Qaeda and was therefore inadmissible to the United States; he was then permitted to make a telephone call to his family, who retained a lawyer on his behalf. The complaint further alleges that Arar met his lawyer at the MDC on the evening of October 5; that, after this meeting, on the evening of Sunday, October 6, defendant McElroy left a message notifying Arar's lawyer that the INS wished to question Arar further; that INS officials then immediately proceeded to question Arar, having falsely told him that his lawyer had chosen not to be present; that, on the following day, INS officials falsely informed Arar's lawyer that Arar had been transferred from the MDC to an unidentified detention facility in New Jersey when, in fact, Arar was still being held at the MDC; and that on October 8, defendant Thompson signed an order authorizing Arar's removal.

The complaint further alleges that, although Arar had designated Canada as the country to which he wished to be removed, on October 8, 2002, U.S. officials caused him to be transported from the MDC to New Jersey, where he was flown to Washington

D.C.; and from Washington D.C. to Amman, Jordan, where Jordanian authorities turned him over to Syrian military officials. Syrian authorities allegedly kept Arar in custody for approximately twelve months; initially subjected him to "physical and psychological torture"--including regular beatings and threats of severe physical harm; and confined him throughout this time in an underground cell six feet long, seven feet high, and three feet wide. *Id.* PP 51-58.

Arar alleges, "[o]n information and belief," that he was removed to Syria pursuant to the U.S. government's "extraordinary rendition" policy, with the knowledge or intention that Syrian officials would extract information from him through torture. *Id.* P 57. He further alleges, "[o]n information and belief," that defendants provided Syrian authorities with information about him, suggested subjects for Syrian authorities to interrogate him about, and received "all information coerced from [him] during [these] interrogations." *Id.* PP 55-56. Thompson, "as Acting Attorney General," is alleged "[o]n information and belief" to have signed the order authorizing Arar's removal to Syria. *Id.* P 48.

B. Procedural history

On January 24, 2005, the United States formally asserted the state-secrets privilege over information relating to Counts one through three of

Arar's complaint. Specifically, the United States explained:

> Litigating [Arar's claims] would necessitate disclosure of classified information, including: (1) the basis for the decision to exclude [Arar] from [the United States] based on the finding that [he] was a member of . . . al Qaeda . . . ; (2) the basis for the rejection of [Arar's] designation of Canada as the country to which [he] wished to be removed . . .; and (3) the considerations involved in the decision to remove [Arar] to Syria.

J.A.131-32,135-36. Shortly thereafter, all defendants moved to dismiss Arar's claims against them. They contended, among other things, that Counts one [*167] through three of Arar's complaint should be dismissed because the assertion of the state-secrets privilege by the United States prevented them from introducing evidence required to present a meaningful defense.[4] Blackman, Ziglar, McElroy, Thompson,

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[4] In *Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991)*, we observed that, "[o]nce properly invoked, the effect of the [state-secrets] privilege is to exclude [privileged] evidence from the case." *Id. at 546*. Thus, although a plaintiff's complaint may "state a claim for relief under notice pleading rules," the plaintiff may not be able to obtain "access to evidence necessary ... to state a prima facie claim." *Id. at 547*. Under such circumstances, "dismissal is probably most appropriate under *Rule 56* on the ground that plaintiff, who bears the burden of proof, lacks sufficient evidence to carry that burden." *Id.*

Ashcroft, and Mueller further contended that Arar had not alleged sufficient personal involvement to state a claim against them in their individual capacities. Thompson, Ashcroft, and Mueller contended, moreover, that they were not subject to personal jurisdiction in New York.

In a memorandum and order filed on February 16, 2006, the District Court, without reaching the issues raised by the assertion of the state-secrets privilege by the United States, dismissed Counts one through three of Arar's complaint with prejudice and Count four without prejudice. With respect to Count one, the District Court concluded that Arar's allegations did not state a claim against defendants under the TVPA. *See414 F. Supp. 2d at 287.* With respect to Counts two and three, it concluded that "special factors" of the kind identified by the Supreme Court counseled against the extension of a *Bivens* remedy, under the *Fifth Amendment*, for Arar's alleged injuries. *Id. at 281-83.* With respect to Count four, involving Arar's allegations about mistreatment while in U.S. custody, the District Court determined that Arar had stated a claim under the *Fifth Amendment*, *id. at 286*, that defendants were not entitled to qualified immunity, *id. at 286*, but that Arar had not alleged sufficient personal involvement by the defendant officials to sue them in their individual capacities--let alone to establish personal jurisdiction over those defendants domiciled outside New York, *id.* Arar declined to replead Count four of his complaint. Accordingly, on August 17, 2006, the

Clerk of Court entered a final judgment dismissing Arar's complaint with prejudice. This timely appeal followed.

On October 23, we directed the parties to submit letter briefs on the question of "whether, and to what extent, the assertion of the state-secrets privilege by the United States could foreclose our ability to adjudicate claims arising from Counts one through three of the complaint." The United States, in its letter brief, maintained that "[t]his Court can and should affirm the [D]istrict [C]ourt's judgment without reaching the [issues raised by the United States's assertion of the] state-secrets privilege," U.S. Letter Br. 8; but that, "if this Court were to reverse the dismissal of claims 1, 2, or 3, the [D]istrict [C]ourt would then be required to determine on remand whether any reinstated claim could proceed notwithstanding the assertion of the state-secrets privilege," *id.* (internal quotation marks omitted). Arar, in his letter brief, "agree[d] with the United States that this Court can and should resolve the pending appeal without considering the state[-]secrets privilege," Pl.'s Letter Br. 1, on the understanding that, if he prevailed in our Court, the District Court could conduct the necessary "case-specific inquiries [regarding the state-secrets privilege] ... on remand," *id.* at 5.

[*168] Therefore, with the agreement of the parties, we evaluate the claims presented under applicable law before considering whether the assertion

of the state-secrets privilege by the United States requires dismissal of this action.

II. Discussion

We review de novo a district court's grant of a motion to dismiss pursuant to *Rule 12(b)(6)* for failure to state a claim. *See, e.g., In re NYSE Specialists Securities Litigation, 503 F.3d 89, 95 (2d Cir. 2007).* In doing so, we "accept[] as true the material facts alleged in the complaint and draw[] all reasonable inferences in [the] plaintiff['s] favor." *See Iqbal v. Hasty, 490 F.3d 143, 152 (2d Cir. 2007)* (internal quotation marks omitted), *cert. granted sub nom., Ashcroft v. Iqbal*, 76 U.S.L.W. 3417, 2008 WL 336310 (U.S. June 16, 2008) (No. 07-1015). Defendants also challenged, pursuant to *Rule 12(b)(1)*, the District Court's subject matter jurisdiction over Arar's removal-related claims and, pursuant to *Rule 12(b)(2)*, its personal jurisdiction over Ashcroft, Thompson and Mueller. We begin our analysis with a consideration of these threshold issues.

A. Subject matter jurisdiction

A federal court has subject matter jurisdiction over a cause of action only when it "has authority to adjudicate the cause" pressed in the complaint. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 127 S. Ct. 1184, 1188, 167 L. Ed. 2d 15 (2007).* Determining the existence of subject matter jurisdiction is a threshold inquiry, *see id.*, and a

claim is "properly dismissed for lack of subject matter jurisdiction under *Rule 12(b)(1)* when the district court lacks the statutory or constitutional power to adjudicate it," *Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)*. When jurisdiction is challenged, the plaintiff "bears the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists," *APWU v. Potter, 343 F.3d 619, 623 (2d Cir. 2003)* (internal quotation marks omitted); *see also Aurecchione v. Schoolman Transp. Sys., 426 F.3d 635, 639 (2d Cir. 2005)*, and the district court may examine evidence outside of the pleadings to make this determination, *see Makarova, 201 F.3d at 113*. Accordingly, "'[j]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.'" *Potter, 343 F.3d at 623* (quoting *Shipping Fin. Servs. Corp v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998))*.[5] When considering a district court's adjudication of such a motion, we review its factual findings for clear error and its legal conclusions de novo. *See id. at 623-24*; *Aurecchione, 426 F.3d at 638*.

Defendants challenge, on statutory grounds, the District Court's subject matter jurisdiction over Counts two and three of Arar's complaint--the *Bivens* claims arising from his overseas detention and al-

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[5] Accordingly, Judge Sack is plainly incorrect to assert that the allegations set forth in Arar's complaint "must be treated as established facts for present purposes." Dissent [25].

leged torture.[6] Specifically, they contend that Congress (1) explicitly foreclosed judicial review of the Attorney General's discretionary decisions when carrying out removal-related duties and (2) created an alternative forum to litigate other removal-related [*169] claims, thereby excepting them from the federal question jurisdiction of the district courts. Arar responds that his attempts to avail himself of that alternative forum were thwarted by defendants and that if he is unable to litigate this action in federal district court, he will have no forum whatsoever to press his constitutional claims.

The Supreme Court has observed that construing a statute to "preclude judicial consideration . . . of . . . an important question of law . . . would raise serious constitutional questions." *INS v. St. Cyr, 533 U.S. 289, 314, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)* (offering this observation in the context of a petition for writ of habeas corpus); *see also Webster v. Doe, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988)* (noting that a "'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim" (quoting *Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, 106 S. Ct. 2133, 90 L. Ed. 2d 623 & n.12 (1986)*)); *Calcano-Martinez, 232 F.3d at 340.* Accordingly,

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[6] Defendants do not challenge the District Court's subject matter jurisdiction over Counts two and three on Article III grounds. We agree that the requirements of Article III have been met with regard to these counts.

"where Congress intends to preclude judicial review of constitutional claims[,] its intent to do so must be clear." *Webster, 486 U.S. at 603* (noting, with approval, the Court's earlier observations to this effect in *Weinberger v. Salfi, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975)* and *Johnson v. Robison, 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974)).*

(1)

As an initial matter, defendants question whether any federal court has jurisdiction to review these *Bivens* claims, noting that the INA affords the Attorney General and his delegates discretion to send a removable alien to a country other than the country he has designated, *8 U.S.C. § 1231(b)(2)(C)*,[7] and insulates from review actions taken pursuant to that discretionary authority, *id. § 1252(a)(2)(B)(ii)*.[8] *See, e.g.*, Ashcroft Br. 23-25 (invoking *8 U.S.C. § 1231(b)(2)(C)* and *§ 1252(a)(2)(B)(ii)* in support of the

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[7] *Section 1231* provides, in relevant part, that "[t]he Attorney General may disregard" an alien's designation of the country to which he wishes to be removed if, among other things, "the government of the country is not willing to accept the alien into the country," *id. § 1231(b)(2)(C)(iii)* or "the Attorney General decides that removing the alien to the country is prejudicial to the United States," *id. § 1231(b)(2)(C)(iv)*.

[8] *Section 1252(a)(2)(B)(ii)* states, in relevant part, that "no court shall have jurisdiction to review ... any ... decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified ... to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum]."

proposition that "insofar as Arar complains about not being sent to his preferred designations or about the determination as to membership in a terrorist organization, Congress has foreclosed any judicial review").

Congress has indeed declined to vest the federal courts with jurisdiction to review discretionary decisions of the Attorney General other than the granting or denial of asylum. *See8 U.S.C. § 1252(a)(2)(B)(ii)*; *Camara v. Dep't of Homeland Sec., 497 F.3d 121, 124 (2d Cir. 2007)*; *Atsilov v. Gonzales, 468 F.3d 112, 115 (2d Cir. 2006)* (noting that the INA "negates our jurisdiction to review a 'decision or action of the Attorney General . . . the authority for which is specified ... to be in the discretion of the Attorney General" (quoting *8 U.S.C. § 1252(a)(2)(B)(ii)*) (first alteration in original)). Congress has, however, in *8 U.S.C. § 1252(a)(2)(D)*, authorized the "appropriate court of appeals" [*170] to consider "constitutional claims or questions of law raised upon a petition for review filed . . . in accordance with [the judicial review provisions of the INA]." *See, e.g., Xiao Ji Chen v. U.S. Dept. of Justice, 471 F.3d 315, 329 (2d Cir. 2006)*. This provision indicates that Congress did not intend to preclude our consideration of removal-related claims that raise questions of law or allege constitutional violations, so long as they are properly before this Court.

(2)

As a secondary matter, defendants contend that, even if Arar has raised constitutional claims, such claims were not properly before the District Court; and therefore, are not properly before us on appeal. Specifically, they assert that INA places removal-related claims beyond the reach of a district court's federal question jurisdiction by creating an alternative--and exclusive--mechanism for resolving those claims.[9] Pursuant to *8 U.S.C. § 1252(b)(9)*, "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States" are channeled into a judicial review scheme providing that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal," *8 U.S.C. § 1252(a)(5)*. *See also id. § 1231* note (providing for claims relating to the "involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture" to be brought under the judicial review scheme established by *section 1252*); *Calcano-Martinez v. INS., 232 F.3d 328, 340 (2d Cir. 2000)*

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[9] *See* Ashcroft Br. 22 ("[Under] the basic judicial review scheme of the INA[,] ... claims arising out of agency actions do not belong in district court."); Thompson Br. 16-17; Mueller Br. 1 n.1 (joining in co-defendants' arguments); Blackman Br. 27 (same); McElroy Br. 25 (same); Ziglar Br. 21 (same).

(noting that the judicial review provisions of the INA provide for "exclusive appellate court" jurisdiction over removal-related claims). Defendants urge that Arar's *Bivens* claims related to his alleged detention and torture in Syria "aris[e] from [the] action taken . . . to remove [Arar] from the United States," *8 U.S.C. § 1252(b)(9)*, and therefore can be reviewed only by petition to the appropriate court of appeals--not by a federal district court.

Federal district courts, like other Article III courts, are "courts of limited jurisdiction ... [that] possess only that power authorized by [the] Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 552, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* (internal quotation marks omitted). We have previously observed that "statutes . . . that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are 'inextricably intertwined' with review of such orders." *Merritt v. Shuttle, Inc. 245 F.3d 182, 187 (2d Cir. 2001)*. In doing so, however, we have noted that "the test for determining whether [a statute vesting exclusive jurisdiction in the courts of appeals] precludes a district court from hearing a particular claim is . . . whether the claim 'could and should have been' presented to and decided by a court of appeals." *Id. at 188* (quoting *City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 339, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958)*).

Arar contends that he could not have presented his claims through the procedure [*171] set forth in *section 1252*. He alleges that defendants intentionally prevented him from pursuing the INA's judicial review provisions by denying him access to counsel, concealing his location from his lawyer, and removing him, in secret, before his lawyer could file a petition with our Court. While we are not obliged to assume the truth of these allegations when evaluating whether a claim should be dismissed for lack of subject matter jurisdiction, *see Makarova, 201 F.3d at 113*, we will do so here for the sole purpose of considering whether Arar's allegations, if true, would compel a determination that the District Court had subject matter jurisdiction.

There is authority for the proposition that official obstruction similar to that alleged by Arar may (1) excuse a plaintiff's failure to comply with a filing deadline, *see, e.g., Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994)* (equitable tolling), or (2) bar a defendant from asserting certain defenses, such as failure to exhaust administrative remedies, *see, e.g., Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004)* (equitable estoppel). However, Arar has set forth no authority--and we are aware of none--for the proposition that allegations of *past* interference permit a plaintiff to avoid a congressionally mandated remedial scheme altogether. In other words, it appears that no court has yet considered whether official misconduct of the sort alleged by Arar may vitiate Congress's determination

that a federal district court is not the appropriate forum for litigating claims arising from an order of removal.

That we are asked to decide this issue on the basis of allegations set forth in an unverified complaint heightens our hesitation. While a verified complaint made "under oath about a matter within [the plaintiff's] knowledge," *Doral Produce Corp. v. Paul Steinberg Assoc., 347 F.3d 36, 39 (2d Cir. 2003)*, constitutes evidence in support of the facts alleged in the complaint, *see Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995)*, "[a]n ordinary or unverified complaint," such as the one filed by Arar in this litigation, "may not constitute [such] evidence," 11 James Wm. Moore et al., *Moore's Federal Practice § 56.14* (3d ed. 2007). Permitting a plaintiff to circumvent a congressionally mandated remedial scheme by alleging in an unverified complaint--perhaps on nothing more than information and belief--that government officials blocked access to the relevant forum would permit widespread evasion of the administrative mechanisms that Congress has established for challenging agency action: mechanisms that include judicial review by the court of appeals. It is, after all, the prerogative of Congress to determine the jurisdiction of the district courts, and we are loath to permit those determinations to be so easily thwarted.[10]

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[10] The partial dissent concludes that "[b]ecause Arar, is not challenging his removal order," the jurisdiction-stripping provisions of the INA "do[] not apply." Dissent [45 n.31] We disagree. As the dissent itself acknowledges, although Arar

[*172] **(3)**

Because we affirm the District Court's dismissal of Counts two and three of Arar's complaint on the basis that a judicial damages remedy is not authorized by *Bivens* and its progeny, *infra* **[30-37]**, we need not determine whether the INA deprived the District Court of subject matter jurisdiction over Arar's removal-related *Bivens* claims.

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does not directly challenge his order of removal, the circumstances of his removal serve as a factual predicate for the claims set forth in counts two and three of Arar's complaint. *Id.* at 204 (expressing the view that "[t]he assessment of Arar's alleged complaint must take into account the entire arc of factual allegations that Arar makes--his interception and arrest; his questioning, principally by FBI agents, about his putative ties to terrorists; his detention and mistreatment at JFK Airport in Queens and the MDC in Brooklyn; the deliberate misleading of both his lawyer and the Canadian Consulate; and his transport to Washington, D.C., and forced transfer to Syrian authorities for further detention and questioning under torture"). The INA clearly provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter* shall be available only in judicial review of a final order under this section." *8 U.S.C. § 1252(b)(9)* (emphasis added). In light of these clear instructions from Congress, the District Court's jurisdiction to hear this matter cannot be resolved as easily as the dissent might wish. *Cf. Ruhrgas AG, 526 U.S. at 583* ("For a court to pronounce upon the merits when it has no jurisdiction to do so ... is for a court to act *ultra vires.*") (ellipsis added, internal quotation marks and modifications omitted).

The Supreme Court has, on several occasions, recognized that "a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'" *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping, 549 U.S. 422, 127 S. Ct. 1184, 1191, 167 L. Ed. 2d 15 (2007)* (quoting *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)*). As the Court has explained: "Jurisdiction is vital only if the court proposes to issue a judgment on the merits." *Id. at 1191-92* (internal quotation marks and brackets omitted). Accordingly, a federal court "that dismisses on ... non-merits grounds ... before finding subject-matter jurisdiction[] makes no assumption of law-declaring power that violates ... separation of powers principles." *Ruhrgas AG, 526 U.S. at 584* (internal quotation marks omitted); *see also id. at 585* (noting that "district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction, *see Moor v. County of Alameda, 411 U.S. 693, [715-16, 93 S. Ct. 1785, 36 L. Ed. 2d 596] (1973)*, or abstain under *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*, without deciding whether the parties present a case or controversy, *see Ellis v. Dyson, 421 U.S. 426, [433-34, 95 S. Ct. 1691, 44 L. Ed. 2d 274] (1975)*").

In *Tenet v. Doe, 544 U.S. 1, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005)*, the Court held that it could dismiss a suit pursuant to *Totten v. United States, 92*

U.S. 105, 23 L. Ed. 605 (1876) (precluding suits arising from a secret espionage agreement between the plaintiff and the United States), without first determining whether the district court had subject matter jurisdiction over the claims in question. *See Tenet, 544 U.S. at 6-7 n.4.* The Court reasoned that the issue of whether to entertain the plaintiffs' claim was, like *Younger* abstention or prudential standing, "the sort of 'threshold question . . . [that] may be resolved before addressing jurisdiction." *Id.* The Court also observed that "[i]t would be inconsistent with the unique and categorical nature of . . . a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry--to first allow discovery or other proceedings in order to resolve the jurisdictional question." *Id.*

Whether Arar's suit was appropriately before the District Court undeniably raises complicated questions of law. In addition, we have concluded that, in light of the Supreme Court's *Bivens* jurisprudence, we are required to dismiss Counts two and three of Arar's complaint as a threshold matter, without considering the merits of the claims raised in those counts. *See* [*173] *infra,* **[30-37]**. Accordingly, we need not decide whether the INA placed Arar's removal-related *Bivens* claims beyond the reach of the District Court's general federal question jurisdiction. *Cf. Sinochem, 127 S. Ct. at 1194* (If ... a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground.... But where ...

jurisdiction is difficult to determine, and [other] considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.").

B. Personal jurisdiction over Ashcroft, Thompson, and Mueller

The requirement that federal courts have personal jurisdiction over the litigants before them arises from "an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (quoting *Int'l Shoe Co. v. Washington, 326 U.S. 310, 318, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).* "In order to survive a motion to dismiss for lack of personal jurisdiction [pursuant to *Rule 12(b)(2)*], a plaintiff must make a *prima facie* showing that jurisdiction exists." *Thomas v. Ashcroft, 470 F.3d 491, 495 (2d Cir. 2006).* A federal court's jurisdiction over non-resident defendants is governed by the law of the state in which the court sits--including that state's long-arm statute--to the extent this law comports with the requirements of due process. *See Henderson v. INS, 157 F.3d 106, 123 (2d Cir. 1998).* Under New York's long-arm statute, "a court may exercise jurisdiction over a non-domiciliary who 'in person or through an agent . . . commits a tortious act within the state' so long as the cause of action arises from that act." *Iqbal, 490 F.3d at 177* (quoting *N.Y. C.P.L.R. 302(a)(2)*).

Defendants Ashcroft, Thompson, and Mueller contend that Arar has failed to make a sufficient showing of their personal involvement in the tortious conduct he alleges. Accordingly, they urge that the claims brought against them be dismissed for lack of personal jurisdiction.

As we recently observed, personal jurisdiction cannot be predicated solely on a defendant's supervisory title; "[r]ather, a plaintiff must show that a defendant personally took part in the activities giving rise to the action at issue." *Iqbal, 490 F.3d at 177* (internal citation and quotation marks omitted). In *Iqbal,* we considered the related questions of whether the plaintiff had pleaded sufficient personal involvement of the defendants to (1) defeat a qualified immunity defense and (2) establish personal jurisdiction over the defendants. *Id.* We addressed first the question of what a plaintiff must allege to overcome a supervisor's assertion of qualified immunity on a *Rule 12(b)(6)* motion to dismiss, holding that the allegations must suggest that the supervisory official:

> (1) directly participated in the violation [of his constitutional rights], (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to

> act on information that constitutional rights were being violated.

Id. at 152; *see also id. at 157-58* (requiring a plaintiff who seeks to establish personal involvement by a defendant official "to amplify [his] claim with some factual allegations in those contexts where such [*174] amplification is needed to render the claim plausible").[11]

The complaint at issue in *Iqbal* set forth the "time frame and place" of the acts alleged to have violated the plaintiff's constitutional rights, *id. at 166*; alleged that these violations arose from "policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11," *id. at 175-76*; and further alleged that various federal officials, including Ashcroft and Mueller, had "condoned" these policies, *id. at 165*.

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[11] The Supreme Court has recently granted certiorari in *Iqbal* for the purpose of considering (1) the appropriate pleading standard when a plaintiff seeks to state an individual-capacity claim, pursuant to *Bivens*, against "a cabinet-level officer or other high-ranking official" and (2) "[w]hether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." Petition for a Writ of Certiorari, *Ashcroft v. Iqbal*, 2008 WL 336225 (U.S. Feb. 6, 2008), *cert. granted*, 76 U.S.L.W. 3417, 2008 WL 336310 (U.S. June 16, 2008) (No. 07-1015).

We noted that the plaintiff's allegations, "although not entirely conclusory, suggest that some of the [p]laintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement." *Id. at 158.* At the same time, we found it

> plausible to believe that senior officials of the Department of justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies.

Id. at 166. Taking into account the preliminary stage of that litigation and the Supreme Court's recent clarification of the standard applicable to *Rule 12(b)(6)* motions to dismiss, *see Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, we concluded that the factual circumstances described in the plaintiff's complaint were sufficiently "plausible" to defeat the defendants' assertion of qualified immunity for lack of personal involvement, *id. at 166.*

Turning to the related question of whether the district court had personal jurisdiction over the defendants, we concluded in *Iqbal* that if a plaintiff has pleaded personal involvement sufficient to defeat a qualified immunity defense, that would also "sufficel]

to establish personal jurisdiction." *Iqbal, 490 F.3d at 177.*

The plausibility standard applicable to a *Rule 12(b)(6)* motion to dismiss is, of course, distinct from the *prima facie* showing required to defeat a *Rule 12(b)(2)* motion to dismiss for lack of personal jurisdiction. *See Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 196-98 (2d Cir. 1990).* However, because our inquiries into the personal involvement necessary to pierce qualified immunity and establish personal jurisdiction are unavoidably "intertwin[ed]," *Iqbal, 490 F.3d at 177*, we now consider whether, in light of the considerations set forth in *Iqbal's* qualified immunity 'analysis, Arar has made a *prima facie* showing that personal jurisdiction exists.

As with the complaint in *Iqbal,* Arar's complaint states the time frame and place of the acts alleged to have violated Arar's rights; alleges that these violations arose from policies providing for the removal of non-U.S. citizens "suspected ... [*175] of terrorist activity" to countries where they could be interrogated under torture, *see* Compl. P 24; and further alleges that defendants "directed, ordered, confirmed, [or] acquiesced" in Arar's removal to Syria and the mistreatment he suffered there, *id.* P71. We therefore conclude that, like the plaintiff in *Iqbal* Arar has alleged sufficient facts about the role that Ashcroft, Thompson, and Mueller played in violating his rights to make a *prima facie* showing that personal jurisdiction over those defendants exists under

New York's long-arm statute. Accordingly, we proceed to consider the arguments that defendants have raised in support of their motions to dismiss, for failure to state a claim upon which relief can be granted, Arar's various causes of action.

C. The Torture Victim Protection Act (Count One)

The TVPA, which is appended as a statutory note to the Alien Tort Claims Act, *28 U.S.C. § 1350*, creates a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation ... subjects an individual to torture." *Id.* § 1350 note (2)(a)(1).[12] The District Court determined that the factual allegations set forth in Arar's complaint did not state a claim that defendants acted "under color of foreign law." United States Br. 54. We agree.

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[12] Several Courts of Appeals have held that neither the TVPA nor the Alien Tort Claims Act establishes the United States's consent to be sued under the cause of action created by the TVPA. *See28 U.S.C. § 1350*; *see also Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992)* ("[A]ny party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit"); *Koohi v. United States, 976 F.2d 1328, 1332 n.4 (9th Cir. 1992)* (noting that the Alien Tort Claims does not constitute a waiver of sovereign immunity); *Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202, 207 (D.C. Cir. 1985)* (same). We agree with our sister circuits. Accordingly, we conclude that any cause of action Arar has under the TVPA exists against the defendants being sued in their individual capacities alone.

When seeking guidance on what it means to act under "color of foreign law" for the purposes of the TVPA, we generally look to "principles of agency law and to jurisprudence under *42 U.S.C. § 1983*." *Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)*. As the Supreme Court has noted, "[t]he traditional definition of acting under color of state law requires that the defendant in a *§ 1983* action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)* (quoting *United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941)*); *see also Hayut v. State Univ. of New York, 352 F.3d 733, 744 (2d Cir. 2003)*. Applied to the present context, this proposition suggests that a defendant alleged to have violated the TVPA acts under color of foreign law when he "exercise[s] power 'possessed by virtue of [foreign] law'" and commits wrongs "'made possible only because the wrongdoer is clothed with the authority of [foreign] law.'" *West, 487 U.S. at 49*.

Arar contends that our prior holdings contemplate a different standard of liability under *§ 1983* and, by extension, the TVPA. Specifically, he asserts that "*Kletschka [v. Driver, 411 F.2d 436 (2d Cir. 1969)* (Lumbard; C.J.)] holds that the *§ 1983* test is satisfied if the state or its officials played a significant role in the result," Plaintiff's Br. 25 (internal quotation marks omitted). We disagree. In *Kletschka*, we stated that, "[w]hen [a] violation [*176] is the

joint product of the exercise of a State power and of a non-State power[,] ... the test under the *Fourteenth Amendment* and *§ 1983* is whether the state or its officials played a 'significant' role in the result." *411 F.2d at 449*. We also noted, however, that, when the "non-State" actor is a federal official, we will not find that state law played a "significant role" unless the complained-of actions can be attributed to "the control or influence of the State defendants." *Id.* As we explained, this "control or influence" test reflects the "evident purpose of*§ 1983*[,] [which is] to provide a remedy when federal rights have been violated through the use or misuse of a power *derived from a State." Id. at 448-49* (emphasis added). Because federal officials cannot exercise power under foreign law without subjecting themselves to the control or influence of a foreign state, our comments in *Kletschka*are entirely consistent with the test for TVPA liability outlined above, which we hereby adopt in this opinion.

Arar alleges that defendants removed him to Syria with the knowledge or intention that Syrian authorities would interrogate him under torture. He also alleges that, while he was in Syria, defendants provided Syrian authorities with information about him, suggested subjects for Syrian authorities to interrogate him about, and received "all information coerced from [him] during [these] interrogations." Compl. P 56. Nowhere, however, does he contend that defendants possessed any power under Syrian law, that their allegedly culpable actions resulted

from the exercise of power under Syrian law, or that they would have been unable to undertake these culpable actions had they not possessed such power. Because prior precedents of the Supreme Court and our Court indicate that such allegations are necessary to state a claim under the TVPA, we affirm the District Court's dismissal of Count one of Arar's complaint.[13]

D. Money damages under the *Fifth Amendment* (Counts Two, Three, and Four)

Counts two and three of Arar's complaint allege that defendants violated Arar's rights under the substantive due process component of the *Fifth Amendment* by removing him to Syria with the knowledge or intention that he would be detained

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[13] The District Court also determined that Arar, "as a non-citizen[,] is unable to demonstrate that he has a viable cause of action," *414 F. Supp. 2d. at 287*, on the understanding that "only U.S. citizens ... are covered by the TVPA," *id. at 263*. Because we affirm on other grounds, we need not engage in extensive analysis of this issue. We do, however, observe that past holdings of our Court, as well as those of our sister courts of appeals, strongly suggest that TVPA actions may in fact be brought by non-U.S. citizens. *See, e.g., Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104-05 (2d Cir. 2000)* (expressing the view that the remedies provided by the TVPA "extend[] . . . to aliens"); *Kadic, 70 F.3d at 236* (reversing a district court judgment that dismissed, for failure to state a claim, a suit brought by "Croat and Muslim citizens of . . . Bosnia-Herzegovina" seeking relief under the TVPA); *see also Arce v. Garcia, 434 F.3d 1254, 1257-58 (11th Cir. 2006)* (allowing TVPA claim by citizens of El Salvador); *Hilao v. Estate of Marcos, 103 F.3d 767, 771 (9th Cir. 1996)* (allowing TVPA claim by citizens of the Philippines).

and tortured there. Count four of Arar's complaint alleges that defendants violated Arar's rights to substantive and procedural due process under the *Fifth Amendment* by mistreating him while he was detained in the United States. Arar contends that both of these alleged violations are actionable pursuant to *Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).*

[*177] On the theory that, "in appropriate circumstances[,] a federal ... court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counselling hesitation in the absence of affirmative action by Congress,'" *Davis v. Passman, 442 U.S. 228, 245, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* (quoting *Bivens, 403 U.S. at 396*), *Bivens* permitted plaintiffs to seek money damages for violations of the *Fourth Amendment*. Since then, however, the Supreme Court has created such remedies on only two other occasions: the first for employment discrimination in violation of the equal protection component of the *Fifth Amendment's Due Process Clause, Davis, 442 U.S. at 234*, and the second for violations of the *Eighth Amendment* by federal prison officials, *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). See Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)* ("In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of ac-

tion for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct.").

Indeed, the Supreme Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky, 487 U.S. 412, 421, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*; *see also Wilkie v. Robbins, 127 S. Ct. 2588, 2597, 168 L. Ed. 2d 389 (2007)* (observing that, "in most instances," the Court "ha[s] found a *Bivens* remedy unjustified"); *Malesko, 534 U.S. at 70* (noting that, since *Carlson*, the Court has "consistently rejected invitations to extend *Bivens*" to new contexts); *FDIC v. Meyer, 510 U.S. 471, 484, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)* (discussing, with approval, the observations offered by the Court in *Schweiker).*

By asking us to devise a new *Bivens* damages action for alleged violations of the substantive due process component of the *Fifth Amendment*, Arar, effectively invites us to disregard the clear instructions of the Supreme Court by extending *Bivens* not only to a new context, but to a new context requiring the courts to intrude deeply into the national security policies and foreign relations of the United States.

(1)

In its most recent consideration of *Bivens*, the Supreme Court set out the following framework for analyzing *Bivens* claims:

> [O]n the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. *[First]*, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the judicial Branch to refrain from providing a new and freestanding remedy in damages. *[Second*, there is the principle that] a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Robbins, 127 S. Ct. at 2598 (quoting *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983))* (internal citation omitted).

[*178] For guidance on what might constitute a "special factor," we turn to the Supreme Court's

past considerations of *Bivens*. The Court's prior precedents reveal a reluctance to create *Bivens* remedies where a coordinate branch of government is "in a far better position than a court," *Bush, 462 U.S. at 389*, to "decide whether ... a remedy should be provided," *id. at 380*; and, if a remedy is to be provided, to decide what form this remedy should take. For example, in *Bush v. Lucas,* the Court declined to create a damages remedy for alleged violations of a federal employee's *First Amendment* rights upon determining that Congress was in a better position "to evaluate the impact" of damages suits "on the efficiency of the civil service." *Id. at 389*. Similarly, in *Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)*, the Court declined to create a damages remedy for alleged violations of constitutional rights by military officers upon noting that the Constitution grants Congress "plenary control over ... regulations, procedures, and remedies related to military discipline," *id. at 301*; Congress, in exercising this authority, created a system of military justice that did not include a damages remedy for alleged violations of constitutional rights by military officers, *id. at 304*; and, therefore, creation of such a remedy by the federal courts "would be plainly inconsistent with Congress' authority in this field," *id.*

In *Schweiker v. Chilicky* the Court, relying on the reasoning set forth in *Bush* and *Chapell*, declined to create a non-statutory damages remedy against government officials alleged to have wrongfully terminated the plaintiffs' Social Security benefits. As

the Court explained, "making the inevitable compromises required in the design" of a welfare program is the responsibility of Congress rather than the courts, *487 U.S. at 429*; Congress had "discharged that responsibility," *id.*, by creating "elaborate administrative remedies," *id. at 424*, for dissatisfied Social Security claimants; in view of the fact that these remedies did not include a provision for recovery of money damages, the Court, in keeping with its prior precedents, would not create a *Bivens* remedy, *id. at 423* (noting that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [the Court has] not created additional *Bivens* remedies"). *Schweiker,* therefore, establishes that "the concept of special factors counselling hesitation in the absence of affirmative action by Congress has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *487 U.S. at 423* (internal quotation marks omitted).

(2)

To the best of our understanding, Arar seeks a *Bivens* remedy for at least two analytically distinct categories of claims. The first set of claims, described in Counts two and three of Arar's complaint, arises from Arar's allegation that defendants removed him to Syria with the knowledge or intention that he

would be detained and tortured there. The second set of claims, described in Count four of the complaint, arises from Arar's allegations about the way in which defendants treated him while he was detained in the United States.[14] [*179] We consider each of these claims in turn.[15]

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[14] It is not clear whether Arar's complaint seeks to raise a third potential set of claims, arising from the general allegations that defendants provided Syrian authorities with information about him and suggested subjects for them to pursue in their interrogation of him. *See* Compl. PP 55-56. We need not explore this issue, however, as Arar has not raised such a claim in his written and oral presentations to this Court. *See, e.g.*, Pl.'s Br. 37 (describing the *Fifth Amendment* claims arising from Arar's removal to Syria as resting on the factual allegations that "defendants (i) acted against [Arar] while he was in Federal custody within the United States and; (ii) transported him abroad precisely to evade constitutional protections"); *see also id.* at 3 (describing the *Fifth Amendment* claims arising from Arar's removal to Syria as resting on the factual allegation that defendants "transport[ed] Arar to Syria" so that Syrian authorities could detain and coercively interrogate him).

[15] Rather than address these legal claims as pleaded by Arar, Judge Sack consolidates all of Arar's allegations into an omnibus generalized grievance, unmoored from any recognized legal claim. Judge Sack would take together events occurring within the United States *and those occurring overseas;* allegations of misconduct attributed to U.S. officials *and to foreign agents;* and violations that allegedly occurred during the period of time that Arar was held in U.S. custody as *well as the time Arar spent in foreign custody*. *See* Dissent [27-28] Judge Sack offers no authority to justify his remarkable treatment of Arar's complaint. It is clear, however, that his approach runs contrary to the Supreme Court's long-standing observations about the constitutional significance of geographic borders. *Cf. Zadvydas v. Davis, 533 U.S. 678, 690, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001)* ("It is well established that certain constitutional protections available to persons inside the United States are

(a)

Arar's removal-related claims arise from the alleged violation of his substantive due process interest in not being involuntarily removed to a country where he would be detained and subjected to torture. Step one of the *Bivens* inquiry reveals that Congress has created alternative processes for protecting this interest. The Foreign Affairs Reform and Restructuring Act of 1988, Pub L. 105-277, codified at *8 U.S.C. § 1231* note ("FARRA"), states that the United States "shall . . . not . . . effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture," *id. § 1231* note (a); and provides for an alien to raise claims based on this section "as part of the review of a final order of removal pursuant to . . . the Immigration and Nationality Act," *id. § 1231* note (d). Thus, as a general matter, *Bivens* relief would not be available for removal-related claims such as the one that Arar raises here because the INA's "alternative, existing" mechanism of review would normally provide "a con-

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unavailable to aliens outside of our geographic borders."); *United States v. Verdugo-Urquidez, 494 U.S. 259, 269, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)* (noting that the Supreme Court's "rejection of extraterritorial application of the *Fifth Amendment* [has been] emphatic"); *Johnson v. Eisentrager, 339 U.S. 763, 771, 70 S. Ct. 936, 94 L. Ed. 1255 (1950)* (noting that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act").

vincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," *Robbins, 127 S. Ct. at 2598*, under step one of our *Bivens* analysis.

Arar maintains, however, that because defendants intentionally prevented him from making use of the INA's judicial review provisions, the allegations of his complaint: compel a different conclusion. Assuming that Arar's allegations are true, it would be perverse to allow defendants to escape liability by pointing to the existence of the very procedures that they allegedly obstructed and asserting that Arar's sole [*180] remedy lay there. Accordingly, we could regard this as a situation where the presence of an alternative remedial scheme does not "amount to a convincing reason for the judicial Branch to refrain from providing a new and freestanding remedy in damages," *Robbins, 127 S. Ct. at 2598.*

Faced with similar allegations in *Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980)*, the Court of Appeals for the Eighth Circuit held that federal officials who interfered with a plaintiff's access to an exclusive administrative remedial scheme could, pursuant to *Bivens*, be held liable for that interference inasmuch as it violated due process, but could not be sued for the underlying injury that the remedial scheme was designed to redress. In *Bishop*, the plaintiff, a federal employee, alleged, *inter alia*, wrongful termination, *id. at 353*, and charged defendants with obstructing his access to the relevant ad-

ministrative remedies, *id. at 353 n.4.* The Eighth Circuit observed that Congress had enacted "civil service discharge appeal procedures" in order to permit "a wrongfully dismissed employee to [obtain] reinstatement and back pay." *Id. at 356.* The court noted, however, that "[t]he existence of civil service discharge appeal procedures is of little avail to [the plaintiff] ... if, as he has alleged, defendants blocked his resort to them." *Id. at 357.* On this basis, the court determined that if the plaintiff "can prove [that] defendants interfered with his right to procedural due process [by obstructing access to the appeal process], he is entitled to the damages that actually resulted" pursuant to *Bivens.*

The Eighth Circuit did not conclude, however, that the interference of federal officials permitted the plaintiff to avoid the procedures for appeal set forth by Congress by litigating his underlying claims--wrongful termination and defamation--through a *Bivens* action in federal district court. *Id.* The court explained:

> A *Bivens* style remedy for wrongfully dismissed federal employees not only is unnecessary but also would be at odds with the existing discharge appeal procedures to the extent that dismissed employees would be encouraged to bypass these procedures in order to seek direct judicial relief against either the government or individual government officers.

Id. Thus, the plaintiff in *Bishop*could maintain a *Bivens* cause of action against the officials for interfering with his due process rights (a claim equivalent to the claim brought by Arar in Count four of his complaint) but not for employment-related claims subject to the relevant procedures for appealing civil service discharges--in essence, claims of an analogous sort to the claims that Arar brings in Counts two and three of his complaint.

We find this reasoning compelling and, like the Eighth Circuit, are reluctant to permit litigants to avoid congressionally mandated remedial schemes on the basis of mere allegations of official interference. Accordingly, the review procedures set forth by the INA provide "a convincing reason," *Robbins, 127 S. Ct. at 2598*, for us to resist recognizing a *Bivens* cause of action for Arar's claims arising from his alleged detention and torture in Syria.[16] Even if they did not, however, our analysis of the significant "special factors," *id.*, implicated by these claims would lead us to [*181] the same result at step two of our *Bivens* analysis.

Step two of our *Bivens* analysis requires us to determine whether Arar's suit implicates what the

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[16] We agree with judge Sack that the alleged circumstances of Arar's removal may have made it difficult for Arar himself to seek relief through the procedures set forth in the INA. We note, however, that Arar did have an attorney working on his behalf; and that his attorney was in a position to inquire about both Arar's whereabouts and the status of the proceedings that the INS had initiated against him.

Supreme Court has described as "special factors" that would counsel against creation of a *Bivens* remedy. "The special factors counselling hesitation in the creation of a new remedy ... d[o] not concern the merits of the particular remedy that [i]s sought. Rather, they relate[] to the question of who should decide whether such a remedy should be provided ... [and] whether there are reasons for allowing Congress to prescribe the scope of relief that is made available." *Bush, 462 U.S. at 380.* Pursuant to the framework set forth by the Supreme Court, we are compelled to defer to the determination of Congress as to the availability of a damages remedy in circumstances where the adjudication of the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country's relations with foreign powers.

The Supreme Court has observed on numerous occasions that determinations relating to national security fall within "an area of executive action in which courts have long been hesitant to intrude." *Lincoln v. Vigil, 508 U.S. 182, 192, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993)* (internal quotation marks omitted); *Department of Navy v. Egan, 484 U.S. 518, 530, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988)* (noting that, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs" and citing illustrative cases). At its core, this suit arises from the Executive Branch's alleged determination that (a) Arar

was affiliated with Al Qaeda, and therefore a threat to national security, and (b) his removal to Syria was appropriate in light of U.S. diplomatic and national security interests. There can be no doubt that for Arar's claims to proceed, he must probe deeply into the inner workings of the national security apparatus of at least three foreign countries, as well as that of the United States, in order to determine the basis for his alleged designation as an Al Qaeda affiliate and his removal to Syria via Jordan despite his request to be removed to Canada. Indeed, the Canadian government, which has provided Arar with compensation for its role in the events giving rise to this litigation, has asserted the need for Canada itself to maintain the confidentiality of material that goes to the heart of Arar's claims. *See* 1 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Factual Background 11-12 (2006) ("Canadian Commission, Factual Background") (noting that the Canadian government required the Commission to review "[a] good deal of evidence . . . *in camera*" out of a need to protect Canadian "national security and international relations interests"). For its part, the United States, as noted above, has invoked the state-secrets privilege in response to Arar's allegations.

Assuming that a sufficient record can even be developed in light of the confidential nature of the relevant evidence and the involvement of at least three foreign governments--Syria, Jordan, and Canada--in the salient events alleged in the complaint,

the District Court would then be called upon to rule on whether Arar's removal was proper in light of the record. In so doing, the effective functioning of U.S. foreign policy would be affected, if not undermined. For, to the extent that the fair and impartial adjudication of Arar's suit requires the federal courts to consider and evaluate the implementation of the foreign and national security policies of the United [*182] States and at least three foreign powers, the ability of the federal government to speak with one voice to its overseas counterparts is diminished, and the coherence and vitality of U.S. foreign policy is called into question.

On this point, the observations of the Court of Appeals for the District of Columbia Circuit are particularly relevant:

> [T]he special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad. The foreign affairs implications of suits such as this cannot be ignored--their ability to produce what the Supreme Court has called in another context "embarrassment of our government abroad" through "multifarious pronouncements by various departments on one question." Whether or not the present litigation is motivated by con-

> siderations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.

Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J) (quoting *Baker v. Carr, 369 U.S. 186, 226, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)).* Similarly, we need not determine whether the motivation behind this lawsuit arises from geopolitical or personal considerations in order to recognize that litigation of this sort threatens to disrupt the implementation of our country's foreign and national security policies. The litigation of Arar's claims would necessarily require an exploration of the intelligence relied upon by the officials charged with implementing our foreign and national security policies, the confidential communications between the United States and foreign powers, and other classified or confidential aspects of those policies, including, perhaps, whether or not such policies even exist.[17] There can be no doubt that

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[17] That adjudication of Arar's claims would require inquiry into national-security intelligence and diplomatic communications cannot be doubted in light of federal regulations providing that, in determining whether removal to a particular country would be consistent with the obligations imposed by FARRA,

litigation of this sort would interfere with the management of our country's, relations with foreign powers and affect our government's ability to ensure national security.

In addition, the Supreme Court has observed that, when considering "the practical consequences of making [a] cause [of action] available to litigants in the federal courts," *Sosa v. Alvarez-Machain, 542 U.S. 692, 732-33, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)*, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy," *id. at 733 n.21*. Here, the United States has asserted the state-secrets privilege over information at the [*183] core of the claims being raised and, in support of that assertion of privilege, both the Acting Attorney General and Secretary of the Department of Homeland Security have submitted sworn state-

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(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. . . .

8 C.F.R. § 208.18(c).

ments that Arar's removal-related claims cannot be adjudicated without harming the diplomatic and national security interests of the United States.

For the reasons stated above, we are not required, at this juncture in the proceedings, to consider the possible consequences of the assertion of the state-secrets privilege by the United States. The assertion of the state-secrets privilege is, however, a matter of record, and a reminder of the undisputed fact that the claims under consideration involve significant national security decisions made in consultation with several foreign powers. *Cf. ante* at [34-35] (noting the Canadian government's efforts to protect evidence relevant to Canadian "national security and international relations interests"); Canadian Commission, Analysis and Recommendations, *ante*, at 11 (stating that the governments of the United States, Jordan, and Syria all declined to "give evidence or otherwise participate" in the hearings held by the Commission). In that sense, the government's assertion of the state-secrets privilege in this litigation constitutes a further special factor counseling us to hesitate before creating a new cause of action or recognizing one in a domain so clearly inhospitable to the fact-finding procedures and methods of adjudication employed by the federal courts.[18]

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[18] Our colleague, in his partial dissent, criticizes the majority for taking the state-secrets doctrine into account in the course of its *Bivens* analysis. *See* Dissent [46] He would rather this suit go forward on the understanding that "[a]ny legitimate interest that the United States has in shielding national secu-

That this action involves the intersection of removal decisions and national security also weighs against creation of a *Bivens* remedy. The Supreme Court has recently rioted that "[r]emoval decisions, including the selection of a removed alien's destination, may implicate our relations with foreign powers," *Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 348, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005)* (internal quotation marks omitted) (quoting *Mathews v. Diaz, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976)*); and it is well established that "[t]he conduct of the foreign relations of

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rity policy and foreign policy from intrusion by federal courts ... would be protected by the proper invocation of the state-secrets privilege." *Id.* Once put into effect, however, the state-secrets doctrine would have the undoubted effect of excluding information of central relevance to the claims brought in this complaint. *See ante* [11-12] (describing the information over which the United States has asserted the state-secrets privilege). The likely result would be foreclosure of our ability to resolve the important legal issues of first impression raised by this case. *See id.; see also El-Masri v. United States, 479 F.3d 296, 300, 313 (4th Cir. 2007)* (dismissing plaintiff's complaint on the basis of the invocation of the state-secrets doctrine by the United States without considering whether, as a matter of law, plaintiff could state a claim under *Bivens* or the Alien Tort Claims Act based on his allegations that he was detained and interrogated "pursuant to an unlawful policy and practice ... known as 'extraordinary rendition': the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws"). In light of the parties' requests for guidance on the important questions of first impression presented by this suit, *see ante* [13] we are reluctant to take the path our colleague suggests.

our Government is committed by the Constitution to the Executive and Legislative--the political--Departments of the Government," *First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766, 92 S. Ct. 1808, 32 L. Ed. 2d 466 (1972)* (quoting *Oetjen v. Central* [*184] *Leather Co., 246 U.S. 297, 302, 38 S. Ct. 309, 62 L. Ed. 726 (1918)* (internal quotation marks omitted)).[19] In that sense, Arar's removal-related claims raise a difficulty similar to that posed by the plaintiffs in *Chappell* Here, as there, the claim under consideration raises questions entrusted principally to other branches of government; one of these other branches--namely, Congress--has exercised its authority to provide "what it considers adequate remedial mechanisms for constitutional violations," *Schweiker, 487 U.S. at 423*; and the remedial scheme in question--appellate review of removal decisions--does not provide for recovery of money damages. In light of these indications that absence of a Congressionally-mandated damages remedy "has not been inadvertent," *Schweiker, 487 U.S. at 423*, we understand the judicial creation of a damages remedy to be "plainly inconsistent," *Chappell, 462 U.S. at 304*, with Congress's exercise of authority over removal-related claims.

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[19] Judge Sack agrees that adjudication of Arar's claims requires us to intrude deeply into the national security policies and foreign relations of the United States, *see* Dissent **[46-48],** but, nevertheless, would hold that Arar's suit presents no "'special factors' counsel[ing] against the application of *Bivens," id.* at **[46]**.

In sum, we hold that--barring further guidance from the Supreme Court--a *Bivens* remedy is unavailable for claims "arising from any action taken or proceeding brought to remove an alien from the United States under" the authority conferred upon the Attorney General and his delegates by the INA. *8 U.S.C. § 1252(b)(9).*

(b)

The vitality of Arar's request for *Bivens* relief for claims arising from Count four of his complaint ("domestic detention") turns, not on the existence of any "special factors," but on the more commonplace fact that Arar's factual allegations fail to state a claim under the *Due Process Clause of the Fifth Amendment.* Arar apparently seeks to bring two distinct types of claims based on events alleged to have occurred in the United States. The first is a "due process" claim based on defendants' alleged obstruction of Arar's access to counsel and to the courts.[20]

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[20] Although Arar describes his second claim as arising under the substantive due process component of the *Fifth Amendment, see, e.g.,* Compl. 23, Plaintiff's Reply Br. 21, the theory of liability he proffers is more suggestive of a procedural due process claim. *See, e.g.,* Plaintiff's Reply Br. 29 (asserting that "Arar had a right to the assistance of his attorney before being, deemed inadmissible, [and] before being removed to a country where he would be tortured"); *id.* at 34 (asserting that Arar had "a right to petition the [relevant court] to enjoin his removal to a country that would torture him"). We need not explore this issue, however, because, as set forth below, Arar has not established that defendants' conduct amounted to interference with a *constitutional* right; and violation of a "constitu-

The second is a substantive due process challenge to the conditions of Arar's U.S. detention. We consider each of these in turn.

(i)

The complaint alleges that, while Arar was incarcerated at the MDC, defendants ignored his initial requests to see a lawyer, misled him about the availability of his lawyer so that they could question him outside her presence, and misled his lawyer about his whereabouts so that they could prevent her from challenging his removal to Syria. Compl. PP 37, 44, 46. These allegations, if taken as true, may be [*185] sufficient to establish that one or more federal officials intentionally obstructed Arar's access to counsel and to the courts. They are not, however, sufficient to establish the appropriateness of *Bivens* relief. Rather, for a *Bivens* remedy to be available, Arar must establish that (1) an individual in his position possessed a constitutional right of access to counsel and the courts, and (2) that defendants' actions violated this constitutional right. *See, e.g., Robbins, 127 S. Ct. at 2598* (noting that violation of a "constitutionally recognized interest" is a necessary element of a *Bivens* claim).

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tionally recognized interest" is a necessary element of a *Bivens* claim, *see, e.g., Robbins, 127 S. Ct. at 2598.*

a. Right to Counsel

Arar contends that our prior precedents--specifically, *Montilla v. INS, 926 F.2d 162 (2d Cir. 1991)* and *Waldron v. INS, 17 F.3d 511 (2d Cir. 1993)*--establish that, although he was an unadmitted alien, he possessed a constitutional right to counsel under the *Due Process Clause of the Fifth Amendment*. He also contends that he possessed a due process right to counsel derived from the rights accorded to him under *8 C.F.R. § 235.8(a)*[21] and *8 U.S.C. §§ 1362*,[22] *1225(c)(3)*[23] and *1225(b)(1)(B)(iv)*.[24]

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[21] *8 C.F.R. § 235.8(a)* reads as follows:

> When an immigration officer or an immigration judge suspects that an arriving alien appears to be inadmissible [on security and related grounds], the immigration officer or immigration judge shall order the alien removed and report the action promptly to the district director who has administrative jurisdiction over the place where the alien has arrived or where the hearing is being held. The immigration officer shall, if possible, take a brief sworn question-and-answer statement from the alien, and the alien shall be notified by personal service of Form I-147, Notice of Temporary Inadmissibility, of the action taken and the right to submit a written statement and additional information for consideration by the Attorney General. The district director shall forward the report to the regional director for further action as provided in paragraph (b) of this section.

[22] *8 U.S.C. § 1362* states that:

> In any removal proceedings before an immigration judge and in any appeal proceedings before the

We conclude that certain of the authorities upon which Arar relies--namely, *Montilla, Waldron* and *8 U.S.C. §§ 1362* and *1225(b)(1)(B)(iv)*--are simply inapplicable to an individual in Arar's position. We further conclude that, even if an unadmitted alien does enjoy a derivative due process right to the assistance of counsel under *8 U.S.C. § 1225(c)(3)* and *8 C.F.R. § 235.8(a)*, that right was neither triggered nor violated by the factual allegations stated in Arar's complaint.

Section 1362 applies only to "removal proceedings before an immigration judge and . . . appeal proceedings before the Attorney General." Similarly,

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Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

[23] *8 U.S.C. § 1225(c)* sets out procedures for the removal of aliens who have been deemed inadmissible "on security and related grounds." *Subsection 1225(c)(3)* provides that, in the case of an alien who falls within the ambit of *section 1225(c)*, "[t]he alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General."

[24] *8 U.S.C. § 1225(b)(1)(B)* sets forth procedures relating to asylum interviews. *Subsection 1225(b)(1)(B)(iv)* provides that "[a]n alien who is eligible for [an asylum] interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process."

Montilla and *Waldron,* recognize the existence of a due process right to counsel in a subset of the [*186] circumstances to which *section 1362* applies--that is, removal of an alien through deportation. *See Waldron, 17 F.3d at 517*; *Montilla, 926 F.2d at 166.*

As an unadmitted alien, Arar as a matter of law lacked a physical presence in the United States.[25] *See Kaplan v. Tod, 267 U.S. 228, 230, 45 S.*

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[25] Judge Sack emphatically proclaims that this is not "an immigration case," *see* Dissent **[22]**, and contends that the majority is incorrect to "treat[] Arar[] . . . as though he were an unadmitted alien," *id.* at **[31]**. Specifically, Judge Sack takes the position that, in regarding Arar as an unadmitted alien, the majority incorrectly "treats Arar as though he was an immigrant seeking entry into the United States." *Id.* at **[32 n.21]**; *see also id.* at 32 (taking the position that Arar cannot properly be treated "for immigration purposes, as though he had been held or turned back at the border" because Arar was not "seeking to immigrate to the United States") (emphasis omitted).

This represents a mischaracterization of the majority's approach, as well as the relevant law and regulations. Arar's intention, or lack thereof, to immigrate to the United States is irrelevant to the question of whether he was an admitted or unadmitted alien. The INA defines "[t]he terms 'admission' and 'admitted' [to] mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *8 U.S.C. § 1101(a)(13)(A)*; *see also id. § 1101(a)(4) ("The term application for admission' bas reference to the application for admission into the United States* and not to the application for the issuance of an immigrant or nonimmigrant visa.") (emphasis added). At the time that the events described in this complaint took place, individuals who, like Arar, were eligible to transfer flights through the United States without obtaining a visa first, *see8 C.F.R. § 1212.1(f)(1)* (describing the "transit without visa" program) were nevertheless subject to "the full border inspection process upon arrival in the U.S.," *see* Press Release, Department of Homeland Security,

Ct. 257, 69 L. Ed. 585 (1925) (noting that an alien "stopped at the boundary line" of the United States "had gained no foothold" in the country). His entitlement to a removal procedure of the sort that would trigger the provisions of *section 1362* was therefore limited to what Congress and the INS saw fit to provide.[26] [*187] *See, e.g., Zadvydas v. Davis,*

Homeland Security and Department of State Take Immediate Steps To Make Air Travel Even Safer (Aug. 2, 2003),available at http://www.dhs.gov/xnews/releases/press_release_ 0227.shtm (last visited June 11, 2008).

Accordingly, it is clear that (1) in subjecting himself to inspection upon arrival at JFK, Arar sought admission to the United States for purposes of the INA; and (2) because the immigration officer refused to authorize Arar's entry into the United States, Arar was not "admitted" for purposes of the INA. In sum, there is no basis--legal or factual--for the criticisms offered by our colleague in his partial dissent.

[26] Our colleague, in his partial dissent, also asserts that Arar's legal status as an unadmitted alien is irrelevant to any analysis of Arar's constitutional claims. This is plainly incorrect. The Supreme Court--both recently and in the past--has looked to the legal status of aliens under immigration law when considering petitions challenging the confinement of these aliens under the *Due Process Clause of the Fifth Amendment. See, e.g., Zadvydas, 533 U.S. at 690* (identifying the issue under consideration to be whether the "indefinite detention of an alien" violates "[t]he *Fifth Amendment's Due Process Clause*" and beginning the analysis of the claim brought by noting that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law"). In *Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S. Ct. 472, 97 L. Ed. 576 (1953)*, for example, the Court considered the petition of an alien challenging the Attorney General's ability to detain him "without notice of any charge against him and without opportunity to be heard in opposition thereto." *Id. at 595.* The Court observed that, "[f]or

533 U.S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) (observing that the full protections of the *Due Process Clause* apply only to "'persons' within the United States"); *Landon v. Plasencia, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982)* (noting that "an alien seeking initial admission to the United States ... has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative"); *Knauff v. Shaughnessy, 338 U.S. 537, 544, 70 S. Ct. 309, 94 L. Ed. 317 (1950)* (holding that "[w]hatever the procedure authorized

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purposes of [ascertaining] [the petitioner's] constitutional right to due process," it was required to take into account that the petitioner's legal status was that "of an alien continuously residing and physically present in the United States." *Id. at 596.* As the Court explained:

> The *Bill of Rights* is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the *Fifth Amendments* and by the *due process clause of the Fourteenth Amendment.*"

Id. at 596 n.5. With respect to the relevance of an alien's legal status, Judge Sack distinguishes between claimed violations of "procedural" due process, where he concedes that status is relevant, and "substantive" due process, where he maintains that status is not. In view of the fact that Judge Sack does not offer any supporting authority from the Supreme Court or our Court--nor are we aware of any--we decline to disregard binding precedent that takes account of an alien's status when considering the scope of that alien's due process rights.

by Congress is, it is due process as far as an alien denied entry is concerned.").

In this case, the applicable statutory provisions specifically authorized the Attorney General to remove Arar "without further inquiry or hearing by an immigration judge" if the Attorney General, after reviewing the evidence establishing his inadmissibility, determined that a hearing "would be prejudicial to the public interest, safety, or security.[27] *See 8 U.S.C. § 1225(c)(2)(B).* Arar does not claim that the Attorney General failed to properly review the evidence of his inadmissibility. Nor does he contend that the procedures set forth in *section 1225(c)* were constitutionally inadequate. *Cf. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953)* (holding that the due process rights of an unadmitted alien barred from entry one security grounds were not violated when he was excluded from the United States without a

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[27] Arar was removed pursuant to *8 U.S.C. § 1182(a)(3)* (removability on security and related grounds) under the procedures set forth in *8 U.S.C. § 1225(c)*; *subsection 1225(c)(2)(B)* provides that:

> If the Attorney General (i) is satisfied on the basis of confidential information that the alien is inadmissible . . . and (ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security, the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

hearing). Accordingly, Arar fails to establish that he possessed any entitlement to a pre-removal hearing. And because he possessed no entitlement to a hearing, he falls beyond the scope of *section 1362* and--by extension--our holdings in *Montilla*and *Waldron. Cf. Plasencia, 459 U.S. at 25* (noting that a "deportation hearing is the usual means of proceeding against an alien already physically in the United States, . . . [and] [an] exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission," and that "the alien who loses his right to reside in the United States in a deportation hearing has a number of substantive rights not available to the alien who is denied admission in an exclusion proceeding"). Arar also falls beyond the scope of the right to counsel set forth in *section 1225(b)(1)(B)(iv)*; this provision is limited to applicants for asylum and Arar neither made, nor makes, a claim to asylum in the United States.

[*188] *Section 1225(c)(3)* and *8 C.F.R. § 235.8(a)* both contemplate that an unadmitted alien being excluded on security grounds will have the opportunity to submit "a written statement and additional information for consideration by the Attorney General." Assuming for the sake of argument that an unadmitted alien who cannot provide a written statement without the assistance of counsel may enjoy a due process entitlement to counsel, we conclude that Arar has not alleged any facts that would trigger such a right. For example, Arar's complaint nowhere alleges that he wished to submit a written

statement but was prevented from doing so by the restrictions that defendants allegedly imposed on his access to counsel. Nor does it allege any background circumstances from which we may draw such an inference.[28]

In sum, Arar is unable to point to any legal authority suggesting that, as an unadmitted alien who was excluded pursuant to the procedures set forth in *8 U.S.C. § 1225(c)*, he possessed any form of entitlement to the assistance of counsel--let alone a constitutional entitlement, the violation of which could constitute a predicate for the *Bivens* relief he seeks. Accordingly, we conclude that Arar's allegations about the various ways in which defendants obstructed his access to counsel fail to state a claim under the *Due Process Clause of the Fifth Amendment.*

b. Right of Access to the Courts

As the Supreme Court has noted, the ultimate purpose of an access to the courts claim is to obtain "effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury, 536 U.S. 403, 414-15, 122 S. Ct.*

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[28] We note that Arar's allegation that he "was never given a meaningful opportunity to contest [the] finding" that he belonged to Al Qaeda, Compl. P38, constitutes a "legal conclusion[] couched as [a] factual allegation[]," *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 121 (2d Cir. 2007).*

2179, 153 L. Ed. 2d 413 (2002). For this reason, the complaint setting forth the claim in question must include an adequate description of a "'nonfrivolous,' 'arguable' underlying claim" that the plaintiff has lost as a result of the complained-of official actions. *Id. at 415.*

Arar's complaint fails this test insofar as his complaint fails to set forth adequately "the underlying cause of action," *id. at 418*, that defendants' conduct compromised. *Compare id. at 418* (finding excessively vague the plaintiff's claim that the defendants' "false and deceptive information and concealment foreclosed [the plaintiff] from effectively seeking adequate legal redress") *with* Compl. P 93 (alleging that, by subjecting Arar to "measures . . . that interfered with his access to lawyers and the courts, Defendants ... violated Plaintiff's right . . . to petition the courts for redress of his grievances"). Although Arar now claims that defendants compromised his right to seek a court order "enjoin[ing] his removal to a country that would torture him, as a violation of FARRA and [the Convention Against Torture ("CAT")]," Plaintiff's Reply Br. 34, his complaint makes no mention of FARRA, the CAT, or the possibility of injunctive relief. *Cf. Harbury, 536 U.S. at 416* ("Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant."). Indeed, Arar's complaint alleges that "[d]efendants ...violated [p]laintiff's right ... to petition the courts for redress

of his grievances" without any further elaboration [*189] whatsoever. Compl. P 93. This conclusory allegation falls far short of the pleading standard set forth in *Harbury*. *See Harbury, 536 U.S. at 418* ("[T]he complaint failed to identify the underlying cause of action that the alleged deception had compromised, going no further than the protean allegation that the State Department and NSC defendants' 'false and deceptive information and concealment foreclosed Plaintiff from effectively seeking adequate legal redress.'"). Accordingly, we conclude that Arar has, failed to state a due process claim based on defendants' alleged obstruction of his access to the courts.

(ii)

The framework for evaluating a conditions-of-confinement challenge brought by an unadmitted alien constitutes a question of first impression for our Court. *Cf. Lynch v. Cannatella, 810 F.2d 1363, 1373 (5th Cir. 1987)* (noting that "[t]he 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States . . . .does not limit the right of excludable aliens detained within United States territory to humane treatment"). Defendants urge us to adopt the position taken by the Fifth Circuit and Eleventh Circuit, both of which look to whether the challenged actions amounted to "gross physical abuse." *Lynch, 810 F.2d at 1374*; *see also Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990)* (noting, in pass-

ing, the holding of *Lynch); Adras v. Nelson, 917 F.2d 1552, 1559 (11th Cir. 1990)* (adopting and applying the approach set forth by the Fifth Circuit in *Lynch).* Arar, in turn, urges us to apply the approach that we have traditionally taken when evaluating substantive due process challenges to conditions of pre-trial confinement. This approach looks to whether the challenged conditions amount to "punishment that may not constitutionally be inflicted upon [pre-trial] detainees *qua* detainees." *Bell v. Wolfish, 441 U.S. 520, 539, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); see also Block v. Rutherford, 468 U.S. 576, 584, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984)* (applying this approach); *Iqbal, 490 F.3d at 168-69* (same).

Arar alleges that, while in the United States, he was subjected to "coercive and involuntary custodial interrogations . . . . conducted for excessively long periods of time and at odd hours of the day and night" on three occasions over twelve days; deprived of sleep and food on his first day of detention; and, thereafter, was "held in solitary confinement, chained and shackled, [and] subjected to [an] invasive strip-search[]." Compl. P 4. These allegations, while describing what might perhaps constitute relatively harsh conditions of detention, do not amount to a claim of gross physical abuse. *Cf. Adras, 917 F.2d at 1559* (finding that detainees had not sufficiently alleged "gross physical abuse" where their complaint claimed, *inter alia,* "insufficient nourishment," "prolonged incarceration under harsh conditions," "deprivation of liberty, embarrassment, hu-

miliation, disgrace and injury to feelings, physical and mental pain and suffering"). For this reason, we conclude that Arar has not adequately alleged that the conditions of his confinement violated his *Fifth Amendment* substantive due process rights under the "gross physical abuse" approach of the Fifth Circuit and Eleventh Circuit.

Arar fares no better under the alternative standard he proposes.[29] As the [*190] Supreme Court noted in *Wolfish*, "the fact that [lawful] detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'" *441 U.S. at 537*. Only if a detention facility official has "expressed intent to punish," *id. at 538* or "a restriction or condition is not reasonably related to a legitimate goal" may a court "infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees," *id. at 539*.

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[29] Judge Sack disagrees with our decision to evaluate Arar's substantive due process claims under the standard that Arar himself proposes, characterizing the Supreme Court's analysis in *Wolfish* as "unhelpful" because Arar "was not a pretrial detainee." Dissent **[35 n.24]** Accordingly, we are puzzled to note that Judge Sack elects to base his conclusion that a *Bivens* action should be available to Arar on two *courts of appeals* decisions relating to the rights of pretrial detainees: *Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), cert. granted sub nom. Ashcroft v. Iqbal*, 76 U.S.L.W. 3417 (U.S. June 16, 2008) (No. 07-1015) and *Magluta v. Samples, 375 F.3d 1269 (11th Cir. 2004)*. *See* Dissent **[40, 42]**.

Arar nowhere alleges that the conditions of his confinement were inflicted with punitive intent or were otherwise unrelated to a legitimate government purpose. Rather, his complaint repeatedly emphasizes that defendants kept him in custody in order to interrogate him, and sought to interrogate him in an effort to obtain information "about his membership in or affiliation with various terrorist groups." Compl. P 31. Nor do the other incidental conditions of his detention--specifically, the shackling, strip search, and delay in providing him with adequate food and sleeping facilities--rise to the level of a constitutional violation. *Cf. Wolfish, 441 U.S. at 530, 543, 558* (rejecting the claim that, in subjecting pretrial detainees to visual body cavity searches and using common rooms to provide temporary sleeping accommodations, the officials running a federal detention facility had violated the detainees' rights of substantive due process). For this reason, we conclude that Arar's allegations also fail to state a claim under the punishment-focused approach we have traditionally applied when analyzing substantive due process challenges to conditions of pre-trial confinement.

Because it is not implicated by, the facts of this case, we leave for another day the question of whether an unadmitted alien challenging his conditions of confinement has rights beyond the right to be free of "gross physical abuse at the hands of state [and] federal officials," *Lynch, 810 F.2d at 1374.*

(iii)

Having determined that the allegations set forth in Count four of Arar's complaint do not state a claim under the *Due Process Clause of the Fifth Amendment*, we affirm the order dismissing Count four of Arar's complaint. Contrary to judge Sack's suggestion, we do not hold that a *Bivens* action is unavailable for the claims raised in Count four of Arar's complaint. *See* Dissent 201-02. Rather, we decline to reach this question in light of Arar's failure to allege facts that, if taken as true, establish the violation of any "constitutionally protected interest." *Robbins, 127 S. Ct. at 2598.*

E. Declaratory relief (General Prayer for Relief)

Arar's prayer for relief includes a request that this Court enter a judgment declaring that the actions defendants took with respect to him "are illegal and violate [his] constitutional, civil, and international [*191] human rights." Compl. 24. Following the Supreme Court's instructions, we begin our analysis by considering "whether this action for a declaratory judgment is the sort of Article III case or controversy to which federal courts are limited." *Calderon v. Ashmus, 523 U.S. 740, 745, 118 S. Ct. 1694, 140 L. Ed. 2d 970 (1998)* (internal quotation marks omitted).

As the Supreme Court has frequently noted, "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*; and "the irreducible constitutional minimum of standing contains three elements," *id.*:

> First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, [affecting the plaintiff in a personal and individual way] and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly . . . trace[able] to, the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (citations and internal quotation marks omitted, first alteration supplied); *see also Baur v. Veneman, 352 F.3d 625, 631-32 (2d Cir. 2003)*. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan, 504 U.S. at 561*.

The conduct of which Arar complains is his alleged detention, by defendants, "for the purpose of removing him to Syria for arbitrary detention and interrogation under torture." Pl.'s Br. 55. The personal injury he alleges is a "bar to reentering the United States," which harms him "because he has worked for sustained periods for U.S. companies in the past, and ... would like to return to the U.S. for that purpose, as well as to visit relatives and friends." Pl.'s Br. 54.

In examining Arar's claim, we conclude that he fails to meet both the "traceability" and "redressability" prongs of the test for constitutional standing set forth by the Supreme Court. The reentry bar from which Arar seeks relief arises as an automatic incident of (1) the finding that Arar was inadmissible to the United States for reasons of national security, *see 8 U.S.C. § 1182(a)(3)(B)*; and (2) the entry of an order of removal pursuant to that finding, *see 8 U.S.C. § 1225(c)*. It bears no relationship with the country of removal that defendants selected for Arar. Any injury associated with the reentry bar is, therefore, not "fairly traceable" to the conduct of which Arar complains--namely, defendants' removal of Arar *"to Syria* for arbitrary detention and interrogation under torture." Pl.'s Br. 55 (emphasis added).

The problem with redressability arises because, as Arar's submissions to both this Court and the District Court unequivocally establish, Arar does

not directly challenge his removal order or defendants' underlying decision to classify him as inadmissible to the United States. *See 414 F. Supp. 2d at 259* (discussing Arar's brief in opposition to defendants' motion to dismiss). Arar contends that "if [he] prevails on his constitutional claims, the removal order will be expunged as null and void, thereby lifting the current barrier to [his] re-entry into the U.S." Pl.'s Br. 53. He does not, however, articulate the theory on which he bases this argument or, for that matter, [*192] set forth any authority in support of his position. We conclude that Arar's claimed injury--namely, the bar to his re-entry to the United States pursuant to a removal order, the lawfulness of which he does not challenge--is not likely to be redressed (indeed, cannot be redressed) by the declaratory judgment he seeks. That is so because a declaration that defendants acted illegally by removing Arar to a particular country for a particular purpose would not change the underlying, uncontested fact that Arar cannot be admitted to the United States: Even if Arar had been removed to Canada rather than Syria, he would still be inadmissible to the United States by virtue of the order of removal entered against him.

Because Arar cannot meet the test for constitutional standing set forth by the Supreme Court, we lack subject matter jurisdiction over his request for a judgment declaring that defendants violated his rights by removing him to Syria for the purpose of arbitrary detention and interrogation under torture.

CONCLUSION

To summarize:

(1) Because we conclude that reasons independent of the state-secrets privilege require dismissal of Arar's complaint, we do not consider whether, if Arar were able to state a claim for relief under notice pleading rules, the assertion of the state-secrets privilege by the United States would require dismissal of Counts one through three of his complaint.

(2) Because we conclude that Arar's complaint has not stated a claim upon which relief can be granted, we need not consider defendants' argument that if any of Arar's claims were cognizable defendants would be entitled to qualified immunity with respect to those claims.

(3) Arar has satisfied Article III requirements as to the claims raised in Counts two and three of his complaint. However, the adjudication of whether, under the facts of this case, the INA stripped the District Court of subject matter jurisdiction to hear Arar's removal-related constitutional claims would be particularly difficult in light of the record before us. Accordingly, we exercise our discretion to dismiss Counts two and three on other threshold--that is, non-merits--grounds, as set forth below.

(4) For the reasons stated above, we conclude that Arar has made a *prima facie* showing sufficient to establish personal jurisdiction over Thompson, Ashcroft, and Mueller at this early stage of the litigation.

As to the causes of action set forth in Arar's complaint, we conclude that:

(5) Count one of Arar's complaint must be dismissed because Arar's allegations about the events surrounding his removal to Syria do not state a claim against defendants under the Torture Victim Protection Act;

(6) Counts two and three of Arar's complaint, which envisage the judicial creation of a cause of action pursuant to the doctrine of *Bivens,* must also be dismissed because (a) the remedial scheme established by Congress is sufficient to convince us at step one of our *Bivens* analysis to refrain from creating a free standing damages remedy for Arar's removal-related claims. Even giving Arar the benefit of the doubt and assuming that this remedial scheme were insufficient to convince us, (b) "special factors" of the kind identified by the Supreme Court in its *Bivens* jurisprudence counsel against the judicial creation of a damages remedy for claims arising from Arar's removal to Syria;

(7) Count four of Arar's complaint must be dismissed because Arar's allegations [*193] about

the mistreatment he suffered while in the United States do not state a claim against defendants under the *Due Process Clause of the Fifth Amendment*; and

(8) With respect to Arar's petition for a declaratory judgment, Arar has not adequately established federal subject matter jurisdiction over his request for a judgment declaring that defendants acted illegally by removing him to Syria so that Syrian authorities could interrogate him under torture.

The judgment of the District Court is **AFFIRMED.**

Arar v. Ashcroft, No. 06-4216

Sack, Circuit Judge, concurring in part and dissenting in part

I. OVERVIEW

Last year, in *Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007)* (Newman, J.), cert. granted sub nom. Ashcroft v. Iqbal, 76 U.S.L.W. 3417 (U.S. June 16, 2008) (No. 07-1015), "[w]e . . . recognize[d] the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attacks. We also recognize[d] that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times." *Id. at 159* (citation omitted). But, we pointed out,

> most . . . rights . . . do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.

Id.[1]

The majority fails, in my view, fully to adhere to these principles. It avoids them by mischaracterizing this as an immigration case, when it is in fact about forbidden tactics allegedly employed by United States law enforcement officers in a terrorism inquiry. Although I concur in some parts of the judgment, I respectfully dissent from its ultimate conclusion. I would vacate the judgment of the district court granting the defendants' motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* and remand for further proceedings

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The plaintiff-appellant, Maher Arar, a resident of Ottawa, Canada, and a dual citizen of Canada and Syria,[2] alleges[3] that [*194] on September

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[1] The Supreme Court granted certiorari in Iqbal to address (1) the requirements under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, for stating an "individual-capacity claim[]" against a "cabinet-level officer or other high-ranking official," and (2) the extent to which a "cabinet-level officer or other high-ranking official" can be held "personally liable for the allegedly unconstitutional acts of subordinate officials." Ashcroft v. Iqbal, 76 U.S.L.W. 3417 (U.S. June 16, 2008) (No. 07-1015); see also Petition for a Writ of Certiorari, Ashcroft v. Iqbal, No. 07-1015 (U.S. cert. granted sub nom. June 16, 2008). These questions have no bearing on the propositions for which this dissent cites Iqbal.

[2] As a teenager, Arar had emigrated from Syria to Canada where he lived with his parents, and then his wife and

26, 2002, he was, by travel happenstance, a transit passenger at New York's John F. Kennedy International Airport ("JFK Airport") in Queens, New York. He had cut short a family vacation in Tunisia and was bound, he thought, for a business meeting in Montreal. What happened to him next would beggar the imagination of Franz Kafka.

When Arar sought to pass through the immigration check-point at JFK Airport in order to catch his connecting flight to Montreal, he was detained by U.S. agents who had been led to believe, on the basis of information provided by Canadian government officials, that Arar had connections with al Qaeda. FBI agents first, and then Immigration and Naturalization Service ("INS")[4] officers, held Arar largely

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children.

[3] For present purposes, on this appeal from a dismissal of the complaint under *Fed. R. Civ. P. 12(b)(6)*, the facts are the factual allegations as pleaded in the complaint. See, e.g., *Iqbal, 490 F.3d at 147*. The fact that Arar did not choose to verify his complaint, see ante at **[10, 19]**, is irrelevant. 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1339 (3d ed. 2004) ("Under *Federal Rule 11*, pleadings, motions, and other papers need not be verified or accompanied by an affidavit except when 'specifically provided by rule or statute' . . . [and] [a] party's verification of a pleading that need not have been verified does not give the pleading any added weight or importance in the eyes of the district court.").

[4] On March 1, 2003, the INS was reconstituted as the Bureau of Immigration and Customs Enforcement and the Bureau of United States Citizenship and Immigration Services, both within the Department of Homeland Security. The actions

incommunicado at several locations in New York City for thirteen days, subjecting him to harsh interrogation under abusive conditions of detention.

Unable to acquire from him the information they sought, the agents attempted to obtain Arar's consent to be removed to Syria. They expected Syrian officials to continue questioning him, but under conditions of torture and abuse that they, the U.S. government agents, would not themselves employ. When Arar declined to consent, the agents sent him to Syria against his will for the purpose, ultimately fulfilled, of having him held captive and further questioned under torture there.

Arar brought suit in the United States District Court for the Eastern District of New York on both statutory and constitutional grounds. He seeks damages from the federal officials he thinks responsible for his abuse. The district court dismissed the action for failure to state a claim upon which relief can be granted. This Court now affirms. I disagree in significant part, and therefore respectfully dissent in significant part.

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at issue in this appeal were taken when the agency was still known as the INS.

II. THE FACTS AS ALLEGED IN ARAR'S COMPLAINT

The majority provides a strikingly spare description of the allegations of fact on the basis of which Arar mounts this appeal. The district court's opinion, see *Arar v. Ashcroft, 414 F. Supp. 2d 250, 252-57 (E.D.N.Y. 2006)*, by contrast, rehearses the facts in considerable detail. According to the district court, the complaint alleges the following facts, repeated here nearly verbatim.[5] They "are assumed to be true for purposes of the pending appeal[], as . . . [is] required [when] . . . reviewing a ruling on a motion to dismiss." *Iqbal, 490 F.3d at 147.*

A. Arar's Apprehension, Detention, and Forcible Transportation to Syria

Arar, in his thirties, is a native of Syria. He immigrated to Canada with his family when he was a teenager. He is a dual citizen of Syria and Canada. He resides in Ottawa.

[*195] In September 2002, while vacationing with his family in Tunisia, he was called back to work by his employer[6] to consult with a prospective

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[5] Citations to the district court opinion are in parentheses. The footnotes and subheadings are mine.

[6] Arar was employed by The MathWorks, Inc., a privately held, Massachusetts-based developer and supplier of software for technical computing. See Complaint, P 12; About The MathWorks, http://www.mathworks.com/company/aboutus/ (last visited May 31, 2008).

client. He purchased a return ticket to Montreal with stops[7] in Zurich and New York. He left Tunisia on September 25, 2002. (*Arar, 414 F. Supp. 2d at 252.*)

On September 26, 2002, Arar arrived from Switzerland at JFK Airport in New York to catch a connecting flight to Montreal. Upon presenting his passport to an immigration inspector, he was identified as "the subject of a . . . lookout as being a member of a known terrorist organization." Complaint ("Cplt.") Ex. D (Decision of J. Scott Blackman, Regional Director) at 2. He was interrogated by various officials for approximately eight hours.[8] The officials asked Arar if he had contacts with terrorist groups, which he categorically denied. Arar was then transported to another site at JFK Airport, where he was placed in solitary confinement. He alleges that he was transported in chains and shackles and was left in a room with no bed and with lights on throughout the night. (*Arar, 414 F. Supp. 2d at 253.*)

The following morning, September 27, 2002, starting at approximately 9:00 a.m., two FBI agents interrogated Arar for about five hours, asking him questions about Osama bin Laden, Iraq, and Palestine. Arar alleges that the agents yelled and swore at him throughout the interrogation. They ignored his

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[7] That is, changes of plane.

[8] According to the complaint, on that day, Arar was questioned first by an FBI agent for five hours, Cplt. P 29, then by an immigration officer for three hours, Cplt. P 31.

repeated requests to make a telephone call and see a lawyer. At 2:00 p.m. that day, Arar was taken back to his cell, chained and shackled, and provided a cold McDonald's meal -- his first food in nearly two days. (Id.)

That evening, Arar was given an opportunity to voluntarily return to Syria, but refused, citing a fear of being tortured if returned there and insisting that he be sent to Canada or returned to Switzerland. An immigration officer told Arar that the United States had a "special interest" in his case and then asked him to sign a form, the contents of which he was not allowed to read. That evening, Arar was transferred, in chains and shackles, to the Metropolitan Detention Center ("MDC") in Brooklyn, New York,[9] where he was strip-searched and placed in solitary confinement. During his initial three days at MDC, Arar's continued requests to meet with a lawyer and make telephone calls were refused. (Id.)

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[9] This is the same federal jail in which, less than a year earlier, Javaid Iqbal was allegedly mistreated. Iqbal, a Muslim inmate accused of violations of *18 U.S.C. §§ 371* and *1028* (conspiracy to defraud the United States and fraud with identification) and held post-9/11 in the MDC, allegedly suffered "unconstitutional actions against him in connection with his confinement under harsh conditions ... after separation from the general prison population." *Iqbal, 490 F.3d at 147, 148 n.1.* We held, with respect to Iqbal's subsequent Bivens actions, that such treatment was not protected, as a matter of law, under the doctrine of qualified immunity. *Id. at 177-78.*

On October 1, 2002,[10] the INS initiated removal proceedings against Arar, who was charged with being temporarily inadmissible because of his membership in al [*196] Qaeda, a group designated by the Secretary of State as a foreign terrorist organization. Upon being given permission to make one telephone call, Arar called his mother-in-law in Ottawa, Canada. (Id.)

Upon learning of Arar's whereabouts, his family contacted the Office for Consular Affairs ("Canadian Consulate")[11] and retained an attorney, Amal Oummih, to represent him. The Canadian Consulate had not been notified of Arar's detention. On October 3, 2002, Arar received a visit from Maureen Girvan from the Canadian Consulate, who, when presented with the document noting Arar's inadmissibility to the United States, assured Arar that removal to Syria was not an option. On October 4, 2002, Arar designated Canada as the country to which he wished to be removed. (Id.)

On October 5, 2002, Arar had his only meeting with counsel. The following day, he was taken in chains and shackles to a room where approximately seven INS officials questioned him about his reasons for opposing removal to Syria. His attorney was not provided advance notice of the interrogation, and Arar further alleges that U.S. officials misled him

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[10] Five days after Arar's arrival in the United States.

[11] In New York City.

into thinking his attorney had chosen not to attend. During the interrogation, Arar continued to express his fear of being tortured if returned to Syria. At the conclusion of the six-hour interrogation, Arar was informed that the officials were discussing his case with "Washington, D.C." Arar was asked to sign a document that appeared to be a transcript. He refused to sign the form. (*Id. at 253-54.*)

The following day (October 7, 2002), attorney Oummih received two telephone calls informing her that Arar had been taken for processing to an INS office at Varick Street in Manhattan, that he would eventually be placed in a detention facility in New Jersey, and that she should call back the following morning for Arar's exact whereabouts. However, Arar alleges that he never left the MDC and that the contents of both of these phone calls to his counsel were false and misleading. (*Id. at 254.*)

That same day, October 7, 2002, the INS Regional Director, J. Scott Blackman, determined from classified and unclassified information that Arar is "clearly and unequivocally" a member of al Qaeda and, therefore, "clearly and unequivocally inadmissible to the United States" under *8 U.S.C. § 1182(a)(3)(B)(i)(V)*. See Cplt. Ex. D. at 1, 3, 5. Based on that finding, Blackman concluded "that there are reasonable grounds to believe that [Arar] is a danger to the security of the United States." Id. at 6 (brackets in original). (*Arar, 414 F. Supp. 2d at 254.*)

At approximately 4:00 a.m. on October 8, 2002, Arar learned that, based on classified information, INS regional director Blackman had ordered that Arar be sent to Syria and that his removal there was consistent with Article Three of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"). Arar pleaded for reconsideration but was told by INS officials that the agency was not governed by the "Geneva Conventions" and that Arar was barred from reentering the country for a period of five years and would be admissible only with the permission of the Attorney General. (Id.)

Later that day, Arar was taken in chains and shackles to a New Jersey airfield, where he boarded a small jet plane bound for Washington, D.C. From there, he was flown to Amman, Jordan, arriving there on October 9, 2002. He was then handed [*197] over to Jordanian authorities, who delivered him to the Syrians later that day. At this time, U.S. officials had not informed either Canadian Consulate official Girvan or attorney Oummih that Arar had been removed to Syria. Arar alleges that Syrian officials refused to accept Arar directly from the United States. (Id.)

Arar's Final Notice of Inadmissability ("Final Notice") ordered him removed without further inquiry before an immigration judge. See Cplt. Ex. D. According to the Final Notice: "The Commissioner of the Immigration and Naturalization Service has de-

termined that your removal to Syria would be consistent with [CAT]." Id. It was dated October 8, 2002, and signed by Deputy Attorney General Larry Thompson. After oral argument in the district court on the defendants' motions to dismiss, in a letter dated August 18, 2005, counsel for Arar clarified that Arar received the Final Notice within hours of boarding the aircraft taking him to Jordan. See Dkt. No. 93. (*Arar, 414 F. Supp. 2d at 254.*)

B. Arar's Detention in Syria

During his ten-month period of detention in Syria, Arar alleges, he was placed in a "grave" cell measuring six feet long, seven feet high, and three feet wide. The cell was located within the Palestine Branch of the Syrian Military Intelligence ("Palestine Branch"). The cell was damp and cold, contained very little light, and was infested with rats, which would enter the cell through a small aperture in the ceiling. Cats would urinate on Arar through the aperture, and sanitary facilities were nonexistent. Arar was allowed to bathe himself in cold water once per week. He was prohibited from exercising and was provided barely edible food. Arar lost forty pounds during his ten-month period of detention in Syria. (Id.)

During his first twelve days in Syrian detention, Arar was interrogated for eighteen hours per day and was physically and psychologically tortured. He was beaten on his palms, hips, and lower back

with a two-inch-thick electric cable. His captors also used their fists to beat him on his stomach, his face, and the back of his neck. He was subjected to excruciating pain and pleaded with his captors to stop, but they would not. He was placed in a room where he could hear the screams of other detainees being tortured and was told that he, too, would be placed in a spine-breaking "chair," hung upside down in a "tire" for beatings, and subjected to electric shocks. To lessen his exposure to the torture, Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan, even though he had never been to Afghanistan and had never been involved in terrorist activity. (*Id. at 255.*)

Arar alleges that his interrogation in Syria was coordinated and planned by U.S. officials, who sent the Syrians a dossier containing specific questions. As evidence of this, Arar notes that the interrogations in the United States and Syria contained identical questions, including a specific question about his relationship with a particular individual wanted for terrorism. In return, the Syrian officials supplied U.S. officials with all information extracted from Arar; plaintiff cites a statement by one Syrian official who has publicly stated that the Syrian government shared information with the United States that it extracted from Arar. See Cplt. Ex. E (January 21, 2004 transcript of CBS's Sixty Minutes II: "His Year In Hell"). (*Arar, 414 F. Supp. 2d at 255.*)

C. Arar's Contact with the Canadian Government While Detained in Syria

The Canadian Embassy contacted the Syrian government about Arar on October [*198] 20, 2002, and the following day, Syrian officials confirmed that they were detaining him. At this point, the Syrian officials ceased interrogating and torturing Arar. (Id.)

Canadian officials visited Arar at the Palestine Branch five times during his ten-month detention. Prior to each visit, Arar was warned not to disclose that he was being mistreated. He complied but eventually broke down during the fifth visit, telling the Canadian consular official that he was being tortured and kept in a grave. (Id.)

Five days later, Arar was brought to a Syrian investigation branch, where he was forced to sign a confession stating that he had participated in terrorist training in Afghanistan even though, Arar states, he has never been to Afghanistan or participated in any terrorist activity. Arar was then taken to an overcrowded Syrian prison, where he remained for six weeks. (Id.)

On September 28, 2003, Arar was transferred back to the Palestine Branch, where he was held for one week. During this week, he heard other detainees screaming in pain and begging for their torture to end. (Id.)

On October 5, 2003, Syria, without filing any charges against Arar, released him into the custody of Canadian Embassy officials in Damascus. He was flown to Ottawa the following day and reunited with his family. (Id.)

Arar contends that he is not a member of any terrorists organization, including al Qaeda, and has never knowingly associated himself with terrorists, terrorist organizations or terrorist activity. Arar claims that the individual about whom he was questioned was a casual acquaintance whom Arar had last seen in October 2001. He believes that he was removed to Syria for interrogation under torture because of his casual acquaintances with this individual and others believed to be involved in terrorist activity. But Arar contends "on information and belief" that there has never been, nor is there now, any reasonable suspicion that he was involved in such activity.[12] Cplt. P 2. (*Arar, 414 F. Supp. 2d at 255-56.*)

Arar alleges that he continues to suffer adverse effects from his ordeal in Syria. He claims that he has trouble relating to his wife and children, suffers from nightmares, is frequently branded a terrorist, and is having trouble finding employment due to

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[12] Footnote in district court opinion, relating to the so-called "LaHood Letter" about a subsequent Canadian inquiry, omitted. See *Arar, 414 F. Supp. 2d at 256 n.1.*

his reputation and inability to travel in the United States. (*Id. at 256.*)

D. U.S. Policy Related to Interrogation of Detainees by Foreign Governments

The complaint alleges on information and belief that Arar was removed to Syria under a covert U.S. policy of "extraordinary rendition," according to which individuals are sent to foreign countries to undergo methods of interrogation not permitted in the United States. The "extraordinary rendition" policy involves the removal of "non-U.S. citizens detained in this country and elsewhere and suspected -- reasonably or unreasonably -- of terrorist activity to countries, including Syria, where interrogations under torture are routine." Cplt. P 24. Arar alleges on information and belief that the United States sends individuals "to countries like Syria precisely because those countries can and do use methods of interrogation to obtain information from detainees that would not be morally acceptable or legal in the United [*199] States and other democracies." Id. The complaint further alleges that the defendants "have facilitated such human rights abuses, exchanging dossiers with intelligence officials in the countries to which non-U.S. citizens are removed." Id. The complaint also alleges that the United States involves Syria in its "extraordinary rendition" program to extract counter-terrorism information. (*Arar, 414 F. Supp. 2d at 256.*)

This "extraordinary rendition" program is not part of any official or declared U.S. public policy; nevertheless, it has received extensive attention in the press, where unnamed U.S. officials and certain foreign officials have admitted to the existence of such a policy. Arar details a number of articles in the mainstream press recounting both the incidents of this particular case and the "extraordinary rendition" program more broadly. These articles are attached as Exhibit C of his complaint. (*Id. at 256-57.*)

Arar alleges that the defendants directed the interrogations by providing information about Arar to Syrian officials and receiving reports on Arar's responses. Consequently, the defendants conspired with, and/or aided and abetted, Syrian officials in arbitrarily detaining, interrogating, and torturing Arar. Arar argues in the alternative that, at a minimum, the defendants knew or at least should have known that there was a substantial likelihood that he would be tortured upon his removal to Syria. (*Id. at 257.*)

E. Syria's Human Rights Record

Arar's claim that he faced a likelihood of torture in Syria is supported by U.S. State Department reports on Syria's human rights practices. See, e.g., Bureau of Democracy, Human Rights, and Labor, United States Department of State, 2004 Country Reports on Human Rights Practices (Released February 28, 2005) ("2004 Report"). According to the

State Department, Syria's "human rights record remained poor, and the Government continued to commit numerous, serious abuses . . . includ[ing] the use of torture in detention, which at times resulted in death." Id. at 1. Although the Syrian constitution officially prohibits such practices, "there was credible evidence that security forces continued to use torture frequently." Id. at 2. The 2004 Report cites "numerous cases of security forces using torture on prisoners in custody." Id. Similar references throughout the 2004 Report, as well as State Department reports from prior years; are legion. See, e.g., Cplt. Ex. A (2002 State Department Human Rights Report on Syria). (*Arar, 414 F. Supp. 2d at 257.*)[13]

F. The Canadian Government Inquiry

On September 18, 2006, a Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Commission"), established by the government of Canada to investigate the Arar affair, issued a three-volume report. See Arar Comm'n, Report of the Events Relating to Maher Arar (2006).[14] A press release issued by the Commission

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[13] The district court's description of the facts as alleged in the complaint ends here.

[14] On October 23, 2007, this Court granted Arar's motion to take judicial notice of the Report insofar as its existence and the scope of its contents were concerned, but denied the motion insofar as it may have sought judicial notice of the facts asserted in the report. But cf. ante at [4-5] (employing the report as the source for facts relating to Canadian involvement in

summarized: "On Maher Arar the Commissioner [Dennis O'Connor] comes to one important [*200] conclusion: 'I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada.'" Press Release, Arar Comm'n, Arar Commission Releases Its Findings on the Handling of the Maher Arar Case 1 (Sept. 18, 2006) (boldface in original), available at http://www.ararcommission.ca/eng/ReleaseFinal-Sept18.pdf (last visited May 31, 2008). On January 26, 2007, the Office of the Prime Minister of Canada issued the following announcement:

> Prime Minister Stephen Harper today released the letter of apology he has sent to Maher Arar and his family for any role Canadian officials may have played in what happened to Mr. Arar, Monia Mazigh and their family in 2002 and 2003.
>
> "Although the events leading up to this terrible ordeal happened under the previous government, our Government will do everything in its power to ensure that the issues raised by Commissioner O'Connor are addressed," said the Prime Minister. "I sincerely hope that these actions will

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the Arar incident).

help Mr. Arar and his familybegin a new and hopeful chapter in their lives."

Canada's New Government has accepted all 23 recommendations made in Commissioner O'Connor's first report, and has already begun acting upon them. The Government has sent letters to both the Syrian and the U.S. governments formally objecting to the treatment of Mr. Arar. Ministers Day and MacKay have also expressed Canada's concerns on this important issue to their American counterparts. Finally, Canada has removed Mr. Arar from Canadian lookout lists, and requested that the United States amend its own records accordingly.

The Prime Minister also announced that Canada's New Government has successfully completed the mediation process with Mr. Arar, fulfilling another one of Commissioner O'Connor's recommendations. This settlement, mutually agreed upon by all parties, ensures that Mr. Arar and his family will obtain fair compensation, in the amount of $10.5 million, plus legal costs, for the ordeal they have suffered.

Press Release, Prime Minister Releases Letter of Apology to Maher Arar and His Family and An-

nounces Completion of Mediation Process (Jan. 26, 2007), available at http://pm.gc.ca/eng/media.asp?id =1509 (last visited May 31, 2008); see also Margaret L. Satterthwaite, Rendered Meaningless: Extraordinary Rendition and the Rule of Law, *75 Geo. Wash. L. Rev. 1333, 1339-40 (2007).*

III. PROCEDURAL HISTORY

A. The Complaint and the District Court's Opinion

On January 22, 2004, Arar filed a complaint in the United States District Court for the Eastern District of New York. In addition to its factual allegations, his complaint asserts as "Claims for Relief":

> 1. That defendants, in contravention of the Torture Victim Prevention Act of 1991 ("TVPA"), *28 U.S.C. § 1350* (note), acted in concert with Jordanian and Syrian officials, and under color of Syrian law, to conspire and/or aid and abet in violating his right to be free from torture (Count 1).
>
> 2. That defendants knowingly or recklessly subjected him to torture and coercive interrogation in Syria in violation of his *Fifth Amendment* right to substantive due process (Count 2).

> 3. That defendants knowingly or recklessly subjected him to arbitrary detention [*201] without trial in Syria in violation of his *Fifth Amendment* right to substantive due process (Count 3).
>
> 4. That defendants intentionally or recklessly subjected him to arbitrary detention and coercive and involuntary custodial interrogation in the United States, and interfered with his ability to obtain counsel or petition the courts for redress, in violation of his *Fifth Amendment* right to substantive due process (Count 4).

See *Arar, 414 F. Supp. 2d at 257-58.*

The district court denied Arar's claim for declaratory relief, dismissed Counts 1, 2, and 3 with prejudice, and dismissed Count 4 without prejudice and with leave to replead. *Id. at 287-88.* The district court decided that: 1) Arar lacks standing to bring a claim for declaratory relief; 2) Arar has no TVPA action since (a) in the court's view, Congress provided no private right of action under the TVPA for non-citizens such as Arar, and (b) he cannot show that defendants were acting under "color of law, of any foreign nation," *id. at 287*; 3) even though the Immigration and Nationality Act ("INA") does not foreclose jurisdiction over Arar's substantive due process claims, no cause of action under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,*

403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), can be extended in light of "special factors counselling hesitation in the absence of affirmative action by Congress," *id. at 396*, namely the national security and foreign policy considerations at stake; and 4) prior cases holding that inadmissible aliens deserve little due process protection are inapplicable to Arar's claim that he was deprived of due process during his period of domestic detention because Arar was not attempting to effect an entry into the United States, and therefore the circumstances and conditions of confinement to which Arar was subjected while in U.S. custody may potentially raise Bivens claims, but Arar was required to replead them without regard to any rendition claim and name those defendants that were personally involved in the alleged unconstitutional treatment. *Arar, 414 F. Supp. 2d at 287-88.*

Arar declined the district court's invitation to replead. Instead, he appeals from the judgment of the district court.

B. The Panel's Majority Opinion

The panel affirms the judgment of the district court as explained by the majority opinion. The majority concludes that (1) the allegations set forth in Arar's complaint are sufficient, at this early stage of the litigation, to establish personal jurisdiction over defendants not resident in New York, but (2) Arar has not established federal subject-matter jurisdic-

tion over his claim for declaratory relief. Ante at **[7-8, 49-51]**. It concludes further that (3) Arar's allegations do not state a claim against the defendants for damages under the TVPA, and (4) we cannot provide Arar with a judicially created cause of action for damages under the *Fifth Amendment*, pursuant to the Bivens doctrine. Id. at **[7-8, 49-51]**. Finally, having decided to dismiss the complaint on these grounds, the majority does not reach the question of whether the INA or the state-secrets privilege foreclose Arar's pursuit of this litigation. Id. at **[49-50]**.

I agree with the majority's conclusions as to personal jurisdiction, Arar's request for a declaratory judgment, and his claim under the TVPA. Unlike the majority, however, I conclude that Arar adequately pleads violations of his constitutional rights and is entitled to proceed with his claims for monetary damages under Bivens. Finally, as Arar and the defendants agree, [*202] were the complaint reinstated and this matter remanded, as I think it should be, the district court could then consider the defendants' assertion of the "state-secrets privilege"[15] in the first instance, and limit discovery as is necessary to meet legitimate national security and related concerns.

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[15] See *United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953)*; *Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991)*.

IV. ANALYSIS

This is not an immigration case. Contrary to the majority's analysis, Arar's allegations do not describe an action arising under or to be decided according to the immigration laws of the United States. Arar did not attempt to enter the United States in any but the most trivial sense; he sought only to transit through JFK Airport in order to travel from one foreign country to another. He was initially interrogated by FBI agents, not INS officials; they sought to learn not about the bona fides of his attempt to "enter" the United States, but about his alleged links to al Qaeda. The INS was not engaged in order to make a determination as to Arar's immigration status. The agency's principal involvement came after the FBI failed to obtain desired information from him, in order to facilitate his transfer to Syria so that he might be further held and questioned under torture.

This lawsuit is thus about the propriety and constitutionality of the manner in which United, States law enforcement agents sought to obtain from Arar information about terrorism or terrorists which they thought -- wrongly as it turned out -- that he possessed. The majority goes astray when it accepts the defendants' attempt to cast it as an immigration matter.[16]

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[16] The district court, by contrast, did not treat this as an immigration case. See *Arar, 414 F. Supp. 2d at 285, 287.*

In my view, the issues raised on this appeal, approached in light of the case Arar actually seeks to assert, are relatively straightforward:

> 1. What is the gravamen of Arar's complaint?
>
> 2. Does it allege a deprivation of his right to substantive due process under the *Fifth Amendment to the United States Constitution*?
>
> 3. If so, is a Bivens action available as a vehicle by which he may seek redress for the violation?
>
> 4. And, if so, are the defendants entitled to qualified immunity?

A. The Gravamen of the Complaint

It is well-settled in this Circuit that "we may not affirm the dismissal of [a plaintiff's] complaint because [he has] proceeded under the wrong theory 'so long as [he has] alleged facts sufficient to support a meritorious legal claim.'" *Hack v. President & Fellows of Yale College, 237 F.3d 81, 89 (2d Cir. 2000)* (quoting *Northrop v. Hoffman of Simsbury, Inc., 134 F.3d 41, 46 (2d Cir. 1997)*), cert. denied, *534 U.S. 888, 122 S. Ct. 201, 151 L. Ed. 2d 142 (2001)*. In considering an appeal such as this one from a district court's grant of the defendants' *Rule 12(b)(6)* motion

to dismiss, "'[f]actual allegations alone are what matter[].'" *Northrop, 134 F.3d at 46* (quoting *Albert v. Carovano, 851 F.2d 561, 571 n.3 (2d Cir. 1988)* (en banc) (citing *Newman v. Silver, 713 F.2d 14, 15 n.1 (2d Cir. 1983)*)).[17] We are, moreover, required to [*203] read the factual allegations in a complaint "as a whole." See *Shapiro v. Cantor, 123 F.3d 717, 719 (2d Cir. 1997)*; see also *Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1252 n.11 (11th Cir. 2005)* (per curiam), cert. denied, *549 U.S. 1032, 127 S. Ct. 596, 166 L. Ed. 2d 431 (2006)*; *Goldwasser v. Ameritech Corp., 222 F.3d 390, 401 (7th Cir. 2000)*.

The allegations contained in Arar's complaint include assertions, which must be treated as established facts for present purposes, that: 1) Arar was apprehended by government agents as he sought to change planes at JFK Airport; he was not seeking to enter the United States; 2) his detention, based on false information given by the government of Canada, was for the purpose of obtaining information from him about terrorism and his alleged links with

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[17] The Federal Rules of Civil Procedure tell us that "[p]leadings must be construed so as to do justice." *Fed. R. Civ. P. 8(e)*. Wright and Miller's treatise counsels that "[t]his provision is not simply a precatory statement but reflects one of the basic philosophies of practice under the federal rules." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1286 (3d ed. 2004). "One of the most important objectives of the federal rules is that lawsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleadings have been artfully drawn." Id.

terrorists and terrorist organizations; 3) he was interrogated harshly on that topic -- mostly by FBI agents -- for many hours over a period of two days; 4) during that period, he was held incommunicado and was mistreated by, among other things, being deprived of food and water for a substantial portion of his time in custody; 5) he was then taken from JFK Airport to the MDC in Brooklyn, where he continued to be held incommunicado and in solitary confinement for another three days; 6) while at the MDC, INS agents sought unsuccessfully to have him agree to be removed to Syria because they and other U.S. government agents intended that he would be questioned there along similar lines, but under torture; 7) thirteen days after Arar had been intercepted and incarcerated at the airport, defendants sent him against his will to Syria. The defendants intended that he be questioned in Syria under torture and while enduring brutal and inhumane conditions of captivity. This was, as alleged, all part of a single course of action, conceived of and executed by the defendants in the United States. Its purpose: to make Arar "talk."

Not until deep in its opinion, though, does the majority come to address the heart of the matter: Arar's treatment by defendants while he was present in the United States. When it finally does, the opinion disposes of the issue by describing only some of the pleaded facts: "[W]hile in the United States," it says, Arar "was subjected to 'coercive and involuntary custodial interrogations . . . conducted for exces-

sively long periods of time and at odd hours of the day and night' on three occasions over thirteen days; 'deprived of sleep and food for extended periods of time'; and, thereafter, was 'held in solitary confinement, chained and shackled, [and] subjected to [an] invasive strip-search[].'" Ante at [45]. Having thus limited its consideration to only a portion of the acts Arar complains of, the majority blandly concludes: "These allegations, while describing what might perhaps constitute relatively harsh conditions of detention, do not amount to a claim of gross physical abuse" necessary to support a conclusion that his due process rights had been infringed. Id. at [45].

But the majority reaches its conclusion by eliding, among other things, the manner in which Arar was taken into custody and the manner in which defendants disposed [*204] of him when their efforts to obtain information from him here proved fruitless. Arar was, in effect, abducted while attempting to transit at JFK Airport. And when he failed to give defendants the information they were looking for, and he refused to be sent "voluntarily" to Syria, they forcibly sent him there to be detained and questioned under torture.

It is true that after setting forth his allegations of fact in detail in his complaint, Arar structures his "claims for relief" to charge knowing or reckless subjection to torture, coercive interrogation, and arbitrary detention in Syria (counts two and three) separately from, among other things, arbitrary

detention and coercive and involuntary custodial interrogation in the United States (count four). See *Arar, 414 F. Supp. 2d at 257-58.* The pleading's form may have contributed to the majority's erroneous separation of the decision to send Arar to Syria to be interrogated under torture from his "domestic" physical mistreatment. But, as noted, "'[f]actual allegations alone are what matter[].'" *Northrop, 134 F.3d at 46* (quoting *Albert, 851 F.2d at 571 n.3*). The assessment of Arar's alleged complaint must take into account the entire arc of factual allegations that Arar makes -- his interception and arrest; his questioning, principally by FBI agents, about his putative ties to terrorists; his detention and mistreatment at JFK Airport in Queens and the MDC in Brooklyn; the deliberate misleading of both his lawyer and the Canadian Consulate; and his transport to Washington, D.C., and forced transfer to Syrian authorities for further detention and questioning under torture.

B. Arar's Pleading of a Substantive Due Process Violation

Principles of substantive due process apply only to a narrow band of extreme misbehavior by government agents acting under color of law: mistreatment of a person that is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lombardi v. Whitman, 485 F.3d 73, 79 (2d Cir. 2007)* (citations and internal quotation marks omitted). When Arar's complaint is read to include all of the actions allegedly taken by the

defendants against him within this country, including the actions taken to send him to Syria with the intent that he be tortured there, it alleges conduct that easily exceeds the level of outrageousness needed to make out a due process claim. Indeed, although the "shocks the conscience" test is undeniably vague, see *Estate of Smith v. Marasco, 430 F.3d 140, 156 (3d Cir. 2005)*; *Schaefer v. Goch, 153 F.3d 793, 798 (7th Cir. 1998)*, "[n]o one doubts that under Supreme Court precedent, interrogation by torture" meets that test, *Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596, 602 (D.C. Cir. 2000)*, rev'd on other grounds, *536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)*;[18] see also *Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952)* (interrogation methods were "too close to the rack and the screw to permit of constitutional differentiation"); *Palko v. Connecticut, 302 U.S. 319, 326, 58 S. Ct. 149, 82 L. Ed. 288 (1937)* (noting that the *Due Process Clause* must at least "give protection against torture, physical or mental"), overruled on other grounds by *Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)*. The defendants did not themselves torture [*205] Arar; they "outsourced" it.[19] But I do not think that whether the

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[18] The Harbury court concluded, nonetheless, that because the murdered alien's mistreatment occurred entirely abroad, he had not suffered a violation of his *Fifth Amendment* rights. See *Harbury, 233 F.3d at 603-04* (relying on *United States v. Verdugo-Urquidez, 494 U.S. 259, 269, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)*).

[19] "[R]endition -- the market approach -- outsources our

defendants violated Arar's *Fifth Amendment* rights turns on whom they selected to do the torturing: themselves, a Syrian Intelligence officer, a warlord in Somalia, a drug cartel in Colombia, a military contractor in Baghdad or Boston, a Mafia family in New Jersey, or a Crip set in South Los Angeles.

We have held that under the state-created danger doctrine, "[w]here a government official takes an affirmative act that creates an opportunity for a third party to harm a victim (or increases the risk of such harm), the government official can potentially be liable for damages." *Lombardi, 485 F.3d at 80*; see also, e.g., *Dwares v. City of New York, 985 F.2d 94, 98-99 (2d Cir. 1993)* (finding liability where the police allegedly gave the green light for skinheads to assault a group of flag-burners), overruled on other grounds by *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*; see also *Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 79 (1st Cir. 2005)* ("[I]n scenarios in which government officials actively direct or assist private actors in causing harm to an individual . . . the government officials and the private actor are essentially joint tortfeasors,

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crimes, which puts us at the mercy of anyone who can expose us, makes us dependent on some of the world's most unsavory actors, and abandons accountability. It is an approach we associate with crime families, not with great nations." Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century 388 (2008). "[O]ne could get the worst of both worlds: national responsibility for acts as to which the agents we have empowered are unaccountable." Id. at 387.

and therefore, may incur shared constitutional responsibility." (citations and internal quotation marks omitted)). We have also held that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. Under these limited circumstances, the state may owe the incarcerated person an affirmative duty to protect against harms to his liberties inflicted by third parties." *Matican v. City of New York, 524 F.3d 151, 155-56 (2d Cir. 2008)* (citations, internal quotation, marks, and footnotes omitted). This "duty arises solely from the State's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization, or other similar restraint of personal liberty." Id.[20]

The majority reaches the wrong conclusion in large measure, I think, by treating Arar's claims as though he were an unadmitted alien seeking entry into the United States. The majority asserts that "[a]s an unadmitted alien, Arar as a matter of law lacked a physical presence in the United States." Ante at **[39]**. And it concludes from this that "the full protections of the *due process clause*" do not apply to Arar because they "apply only to 'persons within the United States.'" Id. (quoting *Zadvydas v. Davis, 533*

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[20] Accordingly, Arar's claim can be analyzed under either of the "two 'separate and distinct theories of liability' under the substantive component of the *Due Process Clause*: 'special relationship' liability or 'state-created-danger' liability." *Benzman v. Whitman, 523 F.3d 119, 127 (2d Cir. 2008).*

U.S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) (internal quotation marks omitted)).

But the notion that, while in New York City, Arar was not "physically present" in the United States, is a legal fiction peculiar to immigration law. It is relevant only to the determination of an alien's immigration [*206] status and related matters. It is indeed a fiction that works largely to the benefit of aliens, permitting them to remain here while immigration officials determine whether they are legally admissible.

If Arar had been seeking to immigrate to the United States,[21] had he been detained at, the immi-

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[21] While the majority opinion from time to time treats Arar as though he was an immigrant seeking entry into the United States, the INA makes a clear distinction between an immigrant seeking entry and an alien seeking only transit through the United States. The INA excludes from the definition of "immigrant" an alien "in immediate and continuous transit through the United States." *8 U.S.C. § 1101(a)(15)(C).* Moreover, at the time Arar flew to JFK Airport, the United States had in place a Transit Without Visa program that allowed an alien who would be required to obtain a visa to enter the United States to transit through a U.S. airport without obtaining a visa. As a citizen of Canada, a visa waiver country, Arar had no need to avail himself of this program. But its existence demonstrates the distinction, recognized by the government, between transit passengers, like Arar, and immigrants seeking entry into the United States. The program was suspended for security reasons on August 2, 2003, long after Arar's attempt to transit through JFK Airport. See Press Release, Department of Homeland Security, Homeland Security and Department of State Take Immediate Steps To Make Air Travel Even Safer (Aug. 2, 2003), available at

gration entry point at JFK Airport; had he thereafter been held at the MDC in Brooklyn pending deportation to his home in Canada, he presumably would have properly been treated, for immigration purposes, as though he had been held or turned back at the border. See *Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215, 73 S. Ct. 625, 97 L. Ed. 956 (1953)* ("Aliens seeking entry obviously can be turned back at the border without more. . . . [T]emporary harborage, an act of legislative grace, bestows no additional rights."); *Kaplan v. Tod, 267 U.S. 228, 230, 45 S. Ct. 257, 69 L. Ed. 585 (1925)* (concluding that an unadmitted alien held on Ellis Island, and later elsewhere within the United States, was "to be regarded as stopped at the boundary line" for naturalization purposes). But for purposes of assessing his treatment by law enforcement agents during his detention and interrogation in several places in the City of New York it cannot follow from a legal fiction applicable to immigration status that Arar, rather like the fictional "little man who wasn't there,"[22] was never in this country.[23] Arar sought not

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http://www.dhs.gov/xnews/releases/pressreleases0227.shtm (last visited May 30, 2008).

[22] Hughes Mearns, Antigonish (1899).

[23] The Supreme Court's decisions and our own invoke the entry fiction in cases related to the determination of an alien's immigration status, and the procedural due process to which an alien is entitled by virtue of that status, not cases adjudicating alleged violations of an alien's substantive due process rights during detention. See, e.g., *Leng May Ma v. Barber, 357 U.S. 185, 78 S. Ct. 1072, 2 L. Ed. 2d 1246 (1958)* (con-

to enter this [*207] country, but to leave it, after transiting briefly through one of its airports. For purposes of identifying the most rudimentary of his rights under the Constitution, the fiction that Arar was not here is senseless. He was here, as a matter of both fact and law, and was therefore entitled to protection against mistreatment under the *Due Process Clause.*

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cluding that temporary parole in United States while alien's admissibility was being determined did not entitle alien to benefit of statute giving Attorney General authority to withhold deportation of any alien "within the United States" if alien would thereby be subjected to physical persecution); *Menon v. Esperdy, 413 F.2d 644, 647 (2d Cir. 1969)* (noting that "since a parole does not constitute an admission into the United States ... th[e] appeal involve[d] an exclusion ... rather than an expulsion"); *Dong Wing Ott v. Shaughnessy, 247 F.2d 769, 770 (2d Cir. 1957)* (per curiam) (holding that the Attorney General's "discretionary power to suspend deportation" did not apply to aliens "within the country on parole," because parole, "by statute[, was] not [to] be regarded as an admission of the alien" (citation and internal quotation marks omitted)), cert. denied, *357 U.S. 925, 78 S. Ct. 1368, 2 L. Ed. 2d 1370 (1958)*; *Knauff v. Shaughnessy, 179 F.2d 628, 630 (2d Cir. 1950)* (per curiam) (alien stopped at the border and detained on Ellis Island "is not 'in the United States' . . . [and therefore] is not entitled to naturalization"); see also *Martinez-Aguero v. Gonzalez, 459 F.3d 618, 623 (5th Cir.)* (rejecting application of the entry fiction to Bivens claims involving the use of excessive force), cert. denied, *549 U.S. 1096, 127 S. Ct. 837, 166 L. Ed. 2d 667 (2006)*; *Kwai Fun Wong v. United States, 373 F.3d 952, 973 (9th Cir. 2004)* ("The entry fiction is best seen ... as a fairly narrow doctrine that primarily determines the procedures that the executive branch must follow before turning an immigrant away." (emphasis in original)).

The majority acknowledges that even an unadmitted alien, treated under the immigration laws as though he was not physically present within the United States, has constitutional rights. The majority sees the scope of those rights as not extending "beyond" freedom from "gross physical abuse." See ante at [47]. I think that unduly narrow. It seems to me that Arar was entitled to the bare-minimum protection that substantive due process affords.

In support of applying a "gross physical abuse" standard, the majority cites *Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987)*, *Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990)*, and *Adras v. Nelson, 917 F.2d 1552, 1559 (11th Cir. 1990)*. These cases are highly doubtful authority for present purposes. Again, they are immigration cases. They deal with the treatment of aliens who, having sought admission to the United States, were awaiting removal or a determination of their status under the immigration laws. It is difficult to understand the relevance of those decisions to the rights of an alien who wished to transit through an American airport but was taken into custody for interrogation as to non-immigration matters instead.

Even accepting these cases as setting forth the applicable standard, however, I think Arar adequately alleges a violation of his substantive due process rights. His allegations, properly construed, describe decisions made and actions taken by defendants within the United States, while Arar was in

the United States, designed to obtain information from him, even if doing so ultimately required his detention and torture abroad. Once the defendants, having despaired of acquiring the information from Arar here, physically caused him to be placed in the hands of someone, somewhere -- anyone, anywhere -- for the purpose of having him tortured, it seems to me that they were subjecting him to the most appalling kind of "gross physical abuse."[24] They thereby violated his right to due process even as the majority artificially limits that right.

It may be worth noting, finally, that in order for one or more of the defendants to be liable for the infringement of Arar's [*208] substantive due process rights, that defendant or those defendants would presumably have to be found by the trier of fact to have participated in a broad enough swath of Arar's mistreatment to be held responsible for the violation. A lone INS agent who asked Arar questions at JFK

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[24] As the majority notes, Arar asserts that his substantive due process rights should be assessed under standards established for pre-trial detainees in *Bell v. Wolfish, 441 U.S. 520, 539, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)* (deciding whether the challenged conditions amount to "punishment that may not constitutionally be inflicted upon [pre-trial] detainees qua detainees"), *Block v. Rutherford, 468 U.S. 576, 584, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984)*, and *Iqbal, 490 F.3d at 168-69*. See ante at **[45-46]**. I find such an analysis under these cases to be unhelpful. The issue here is not whether Arar was "punished" as a pre-trial detainee without first being tried and convicted. He was not a pre-trial detainee. The question is whether, as a person detained in the United States for interrogation, he may be mistreated and sent to be tortured in the way that he was.

Airport on September 26, or the pilot of the airplane in which Arar was sent to Washington, D.C., en route to Jordan and Syria on October 8, would be unlikely to be liable to Arar for damages for their limited roles in the events. Who, if anyone, fits that description however, seems to me a question that cannot be addressed at this time, without the fruits of pre-trial discovery.

C. Availability of a Bivens Action

In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, the Supreme Court "recognized for the first time an implied private right of action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001).*[25] The

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[25] Bivens thus gave persons whose constitutional rights were violated by federal officers a remedy roughly akin to that available under *42 U.S.C. § 1983* to persons aggrieved by the acts, of state officers. Unlike a Bivens action, the remedy provided by *section 1983* is statutory in nature. But that statute was virtually a dead letter until it was given life by an interpretation of the Supreme Court some ninety years after it was enacted. See *Monroe v. Pape, 365 U.S. 167, 171-72, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)* (concluding that what is now *section 1983*, derived from section 1of the "Ku Klux Act" of 1871 , provides for a cause of action against a state official acting under color of state law even if there is no authority under state law, custom, or usage for the state official to do what he or she did), overruled on other grounds by *Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).*

Bivens Court permitted "a victim of a *Fourth Amendment* violation by federal officers [to] bring suit for money damages against the officers in federal court." Id.

I have no quarrel with much of what I take to be the majority's view of Bivens jurisprudence. The Supreme Court has indeed been most reluctant to "extend" use of the "Bivens model." *Wilkie v. Robbins, 127 S. Ct. 2588, 2597, 168 L. Ed. 2d 389 (2007).* Since Bivens, the Court has "extended" its reach only twice -- to "recognize[] an implied damages remedy under the *Due Process Clause of the Fifth Amendment, Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979),* and the *Cruel and Unusual Punishments Clause of the Eighth Amendment, Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).*" *Malesko, 534 U.S. at 67*; see also *Wilkie, 127 S. Ct. at 2597-98.*

The majority is also correct in observing that when determining whether to extend Bivens, i.e., whether "to devise a new Bivens damages action," *Wilkie, 127 S. Ct. at 2597*, a court must first determine whether Congress has provided "any alternative, existing process for protecting the interest" in question, *id. at 2598*. If no alternative remedial scheme exists, whether to provide "a Bivens remedy is a matter of judicial judgment." Id. "'[T]he federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special fac-

tors counselling hesitation before authorizing a new kind of federal litigation.'" Id. (quoting *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)).*

But not every attempt to employ Bivens to redress asserted constitutional violations requires a separate and independent [*209] judicial inquiry as to whether the remedy is appropriate in that particular case. Only when the court is being asked "to devise a new Bivens damages action," *id. at 2597* (emphasis added), do we make such an assessment. And a "new Bivens damages action" is not being sought unless the plaintiff is asking the court to "extend Bivens liability to a[] new context or new category of defendants." *Malesko, 534 U.S. at 68.*

In the case before us, Arar seeks to add no new category of defendants. Cf. *Malesko, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456* (refusing to extend Bivens to claims against private prisons); *FDIC v. Meyer, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)* (refusing to extend Bivens to claims against federal agencies). Indeed, it was recovery of damages incurred as a result of the violation of constitutional rights by federal agents and officials, such as the defendants here, for which the Bivens remedy was devised. See *Malesko, 534 U.S. at 70* ("The purpose of Bivens is to deter individual federal officers from committing constitutional violations.").

We must ask, then, whether Arar seeks to extend Bivens liability into a new context and, if so, what that new context is. The task is complicated by the fact that the meaning that the Supreme Court ascribes to the term "new context" is not entirely clear. Compare *Malesko, 534 U.S. at 67* (noting that Bivens was extended to a new context in *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)*, when the Court "recognized an implied damages remedy under the *Due Process Clause of the Fifth Amendment* (emphasis added)), with *id. at 68* (describing *Schweiker v. Chilicky, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*, in which the plaintiffs sought damages under the *Due Process Clause of the Fifth Amendment* for errors made by federal officials in "in the[] handling [their] of Social Security applications," as describing a new context to which the Court declined to extend Bivens (emphasis added)). The majority seems to be of the view that "new context" means a new set of facts, rather than a new legal context. But every case we hear presents a new set of facts to which we are expected to apply established law. Yet, each panel of this Court does not decide for itself, on an ad hoc basis, whether or not it is a good idea to allow a plaintiff, on the particular factual circumstances presented, to avail him or herself of a well-established remedy such as that afforded by Bivens.[26] I therefore think that the word

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[26] Indeed, in those legal contexts where Bivens is well-established, courts do not conduct a fresh assessment as to whether a Bivens action is available based on the facts of each case. See, e.g., *Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284,*

"context," as employed for purposes of deciding whether we are "devis[ing] a new Bivens damages action," *Wilkie, 127 S. Ct. at 2597*, is best understood to mean legal context -- in this case a substantive due process claim by a federal detainee -- and not, as the majority would have it, the fact-specific "context" of Arar's treatment, from his being taken into custody as a suspected member of al Qaeda to [*210] his being sent to Syria to be questioned under torture.

As far as I can determine, this Circuit has never explicitly decided whether a Bivens action can lie for alleged violations of substantive due process under the *Fifth Amendment*. But our cases imply that such a remedy is appropriate.

In Iqbal, for example, we considered a Bivens action brought on, inter alia, a *Fifth Amendment* substantive due process theory. The plaintiff alleged his physical mistreatment and humiliation, as a Muslim prisoner, by federal prison officials, while he was detained at the MDC. After concluding, on

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157 L. Ed. 2d 1068 (2004) (Bivens action for *Fourth Amendment* violation); *McCarthy v. Madigan, 503 U.S. 140, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992)* (Bivens action for *Eighth Amendment* violation), superseded by statute on other grounds as stated in *Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001)*; *Castro v. United States, 34 F.3d 106 (2d Cir. 1994)* (*Fourth Amendment*); *Armstrong v. Sears, 33 F.3d 182 (2d Cir. 1994)* (same); *Anderson v. Branen, 17 F.3d 552 (2d Cir. 1994)* (same); *Hallock v. Bonner, 387 F.3d 147 (2d Cir. 2004)* (same), rev'd on other grounds, *546 U.S. 345, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)*.

interlocutory appeal, that the defendants were not entitled to qualified immunity, we returned the matter to the district court for further proceedings. We did not somuch as hint either that a Bivens remedy was unavailable or that its availability would constitute an unwarranted extension of the Bivens doctrine.[27] *Iqbal, 490 F.3d at 177-78.*

In any event, I see no reason why Bivens should not be available to vindicate *Fifth Amendment* substantive due process rights. As Judge Posner wrote for the Seventh Circuit with respect to a Bivens action:

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[27] Shortly after we decided Iqbal, the Supreme Court made clear that by appealing from the district court's denial of qualified immunity, the defendants placed within our jurisdiction "the recognition of the entire cause of action." *Wilkie, 127 S. Ct. at 2597 n.4.* The district court in Iqbal had specifically rejected the defendants' argument that a Bivens action was unavailable. *Elmaghraby v. Ashcroft, No. 04 CV 01809, 2005 WL 2375202, at *14, 2005 U.S. Dist. LEXIS 21434, *44-*45 (E.D.N.Y. Sept. 27, 2005).* Thus, had we thought that no Bivens action was available, we had the power to resolve Iqbal's claims on that basis then. *Wilkie, 127 S. Ct. at 2597 n.4.*

See also *Thomas v. Ashcroft, 470 F.3d 491 (2d Cir. 2006)* (reversing district court's dismissal of Bivens action for violation of plaintiffs *Fifth Amendment* substantive due process rights while detained at the MDC); *Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000)* (dismissing, on qualified immunity grounds, plaintiffs substantive due process Bivens claim against federal prison officials, without questioning whether a cause of action was available); *Li v. Canarozzi, 142 F.3d 83 (2d Cir. 1998)* (affirming judgment following jury verdict for the defendants in substantive due process Bivens action based on allegations of abuse by a prison guard at the federal Metropolitan Correctional Center in New York City).

> [I]f ever there were a strong case for 'substantive due process,' it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody. If the wanton or malicious infliction of severe pain or suffering upon a person being arrested violates the *Fourth Amendment* -- as no one doubts -- and if the wanton or malicious infliction of severe pain or suffering upon a prison inmate violates the *Eighth Amendment* -- as no one doubts -- it would be surprising if the wanton or malicious infliction of severe pain or suffering upon a person confined following his arrest but not yet charged or convicted were thought consistent with due process.

Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989), cert. denied, *493 U.S. 1026, 110 S. Ct. 733, 107 L. Ed. 2d 752 (1990)*;[28] accord *Magluta v. Samples, 375 F.3d 1269 (11th Cir. 2004)* (reversing district court's dismissal of pretrial detainee's Bivens action alleging unconstitutional conditions of confinement at federal penitentiary in violation of the *Due Process Clause of the Fifth Amendment*); *Cale v. Johnson, 861 F.2d 943, 946-47 (6th Cir. 1988)* (con-

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[28] Although there is some disagreement in the Circuits regarding precisely when, following arrest, abuse of detained persons is to be analyzed under principles of substantive due process, we think Wilkins' comment as to why those principles must apply at some point is insightful and remains valid.

cluding [*211] that "federal courts have the jurisdictional authority to entertain a Bivens action brought by a federal prisoner, alleging violations of his right to substantive due process"), abrogated on other grounds by *Thaddeus-X v. Blatter, 175 F.3d 378, 387-88 (6th Cir. 1999)*; see also *Sell v. United States, 539 U.S. 166, 193, 123 S. Ct. 2174, 156 L. Ed. 2d 197* (Scalia, J., dissenting) (observing, in dissent, that "a [Bivens] action . . . is available to federal pretrial detainees challenging the conditions of their confinement" (citing *Lyons v. U.S. Marshals, 840 F.2d 202 (3d Cir. 1988)*).[29]

A federal inmate serving a prison sentence can employ Bivens to seek damages resulting from mistreatment by prison officials. *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)*. It would be odd if a federal detainee not charged with or convicted of any offense could not bring an analogous claim.[30]

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[29] While cases permitting pre-trial detainees to bring Bivens actions for violations of their substantive due process rights support the availability of a Bivens action here, Arar's substantive due process claim should not be evaluated under the standard for assessing the claims of persons who, unlike Arar, were detained pre-trial rather than for the purpose of interrogation. See supra [note 24]. Cf. ante at [46 n.29].

[30] We have not been asked by the parties to examine the possibility that Arar has pleaded facts sufficient to raise a claim under theories other than substantive due process -- such as under the *Fourth Amendment*, the *self-incrimination clause of the Fifth Amendment*, or even the *Eighth Amendment*. Because this is an appeal from a dismissal on the facts pleaded in the complaint under *Rule 12(b)(6)*, I think that even if this

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Even if "new context" for Bivens purposes does mean a new set of facts, however, and even if Iqbal, despite its factual and legal similarities, does not foreclose the notion that the facts of this case are sufficiently new to present a "new context," I think the majority's conclusion is in error.

The majority, applying the first step of the Bivens inquiry, argues that the INA provided an alternative remedial scheme for Arar. Ante at **[31-33]**. The district court correctly noted to the contrary that "Arar alleges that his final order of removal was issued moments before his removal to Syria, which suggests that it may have been unforeseeable or impossible to successfully seek a stay, preserving Arar's procedural rights under the INA." *Arar, 414 F. Supp. 2d at 280.* Nonetheless, the majority ultimately finds that this claim of official interference does not exclude the INA as providing an alternative remedial scheme. It relies on *Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980)*, which, it says, stands for the proposition that "federal officials who interfere [] with a plaintiff's access to an exclusive remedial scheme c[an], pursuant to Bivens, be held liable for that interference inasmuch as it violated due process, but c[an]

Court were to consider such an alternate theory and conclude that it was valid, the case would be subject to remand to the district court for further proceedings on that theory. See section IV.A. *supra.*

not be sued for the underlying injury that the remedial scheme was designed to redress." Ante at **[31-32]**.

Arar is not, however, seeking relief for the underlying injury that the INA was designed to redress. As the majority recognizes, ante at **[49]**, he is not challenging his removal order. Nor is he questioning this country's ability, however it might limit itself under its immigration laws, to remove an alien under those laws to a country of its choosing. He is challenging the constitutionality of his treatment by defendant law-enforcement officers while he was [*212] in detention in the United States.[31] For allegations of this sort, the INA offers no mechanism for redress. As the district court noted correctly:

> [T]he INA deals overwhelmingly with the admission, exclusion and removal of

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[31] Arar raises an actionable claim under Bivens for constitutional violations incurred at the hands of federal officials during his detention in the United States. The district court had jurisdiction over Arar's claims pursuant to *28 U.S.C. § 1331*, and we have appellate jurisdiction under *28 U.S.C. § 1291*. See *Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)*; *Macias v. Zenk, 495 F.3d 37, 40 (2d Cir. 2007)*. Because Arar is not challenging his removal order, see ante at **[49]**, the jurisdiction-stripping provision of the INA, *8 U.S.C. § 1252(a)(2)(B)(ii)* (providing that "no court shall have jurisdiction to review ... any ... decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified ... to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum]") does not apply.

> aliens -- almost all of whom seek to remain within this country until their claims are fairly resolved. That framework does not automatically lead to an adequate and meaningful remedy for the conduct alleged here.
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> *Arar, 414 F. Supp. 2d at 280.*[32]

The majority also errs, I think, in concluding that "special factors" counsel against the application of Bivens here. Ante at **[33-38]**. The majority dwells at length on the implications of Arar's Bivens claim for diplomatic relations and foreign policy. See ante at **[33-38]**.

Any legitimate interest that the United States has in shielding national security policy and foreign

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[32] The majority says that its holding is limited to the conclusion that, "barring further guidance from the Supreme Court . . . a Bivens remedy is unavailable for claims 'arising from any action taken or proceeding brought to remove an alien from the United States under' the authority conferred upon the Attorney General and his delegates by the INA." Ante at [38] (quoting *8 U.S.C. § 1252(b)(9)*. But this is not an immigration case and it seems to me that "the authority conferred upon the Attorney General and his delegates by the INA" is therefore not relevant to the Bivens question presented. The majority offers no view as to whether a substantive due process Bivens action is available to detained persons generally. I cannot ultimately tell, then, what the majority's view would be as to Arar's ability to avail himself of Bivens if we were to treat this case, as I think we must, as a claim that law enforcement officials abused their authority under color of federal law rather than a case arising under and governed by immigration law.

policy from intrusion by federal courts, however, would be protected by the proper invocation of the state-secrets privilege. The majority says that the "government's assertion of the state-secrets privilege . . . constitutes a . . . special factor counseling this Court to hesitate before creating a new [Bivens action]." Ante at **[36-37].** But as the majority earlier acknowledges, "[o]nce properly invoked, the effect of the [state-secrets] privilege is to exclude [privileged] evidence from the case." Ante at **[12 n.4]** (citing *Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991)).*

Moreover, the state-secrets privilege is a. narrow device that must be specifically invoked by the United States and established by it on a case-by-case basis. See *Zuckerbraun, 935 F.2d at 546* ("The privilege may be invoked only by the government and may be asserted even when the government is not a party to the case."). That seems far preferable to the majority's blunderbuss solution -- to withhold categorically the availability of a Bivens cause of [*213] action in all such cases -- and the concomitant additional license it gives federal officials to violate constitutional rights with virtual impunity. Rather than counseling against applying Bivens, the availability to the defendants of the state-secrets privilege counsels permitting a Bivens action to go forward by ensuring that such proceedings will not endanger the kinds of interests that properly concern the majority.

The majority reaches its conclusion, moreover, on the basis of the proposition that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments of the Government," ante at [37] (citing *First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766, 92 S. Ct. 1808, 32 L. Ed. 2d 466 (1972)* (plurality opinion)). But there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security. See, e.g., *Hamdi v. Rumsfeld, 542 U.S. 507, 536, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)* ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."); *Mitchell v. Forsyth, 472 U.S. 511, 523, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)* ("[D]espite our recognition of the importance of [the Attorney General's activities in the name of national security] to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary."); *Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S. Ct. 231, 78 L. Ed. 413 (1934)* ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."). As the Supreme Court observed in *Baker v. Carr, 369 U.S 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*, "it is error to suppose that every case or controversy' which touches foreign relations lies beyond judicial cognizance." *Id. at 211*; see

also Brief of Retired Federal Judges as Amici Curiae at 11 ("The Supreme Court has made clear that the Executive's power to protect national security or conduct foreign affairs does not deprive the judiciary of its authority to act as a check against abuses of those powers that violate individual rights.").

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The alleged intentional acts which resulted in Arar's eventual torture and inhumane captivity were taken by federal officials while the officials and Arar were within United States borders, and while Arar was in the custody of those federal officials.[33] He

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[33] Irrespective of what ultimately happened to Arar abroad, the actions that he challenges were perpetrated by U.S. agents entirely within the United States. This case is thus decisively different from *United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)*, where the allegedly unconstitutional conduct, an illegal search and seizure, took place in Mexico. It is similarly different from *Johnson v. Eisentrager, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950)*, which held that "(a) ... an enemy alien; (b) [who] has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and [wa]s at all times imprisoned outside the United States" did not have a right to seek a writ of habeas corpus from the courts of the United States on the grounds that, inter alia, his *Fifth Amendment* rights had been violated. *Id. at 777.* Eisentrager remains good law for the proposition that there is "no authority ... for holding that the *Fifth Amendment* confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," *id. at 783.* But that proposition is not inconsistent with any principle that Arar

therefore presents this [*214] Court with a classic, or at the very least viable, Bivens claim -- a request for damages incurred as a result of violations of his *Fifth Amendment* substantive due process rights by federal officials while they detained him.

D. Qualified Immunity

Having thus found that Arar makes out an actionable claim under Bivens, we must analyze whether the defendants are entitled to qualified immunity. In Iqbal, we set forth the elements of qualified immunity review:

> The first step in a qualified immunity inquiry is to determine whether the alleged facts demonstrate that a defendant violated a constitutional right. If the allegations show that a defendant violated a constitutional right, the next step is to determine whether that right was clearly established at the time of the challenged action -- that is, whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. A defendant will be entitled to qualified immunity if either (1) his actions did not violate clearly established law or (2) it was objectively reasonable for

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asserts or that this dissent embraces or applies.

him to believe that his actions did not violate clearly established law.

Iqbal, 490 F.3d at 152 (citations and internal quotation marks omitted). For the reasons set forth above, I have little doubt as to step one: The facts as alleged constitute a violation of Arar's constitutional rights.

We must therefore ask whether these rights were clearly established at the time of their violation. In Iqbal, as already noted above, "[w]e . . . recognize[d] the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attacks. We also recognize[d] that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times." *Iqbal, 490 F.3d at 159*. But we said that the right to substantive due process -- including "the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination" -- "do[es] not vary with surrounding circumstances." Id."The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." Id. We said nothing to indicate that this notion was novel at the time of Iqbal's alleged mistreatment; neither was it at the time of Arar's some months later.

The question here is whether the treatment that Arar received at the hands of the defendants in order to coerce him to "talk" would be understood by a reasonable officer to be beyond the constitutional pale. We need not recite the facts as alleged yet again in order to conclude that they would have been. "No one doubts that under Supreme Court precedent, interrogation by torture like that alleged by [the plaintiff] shocks the conscience," *Harbury, 233 F.3d at 602*, and would therefore constitute a violation of the plaintiff's *Fifth Amendment* right to substantive due process if perpetrated directly by the defendants, cf. *Chavez v. Martinez, 538 U.S. 760, 773, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003)* (plurality opinion) (stating that the *Due Process Clause* would "provide relief [*215] in appropriate circumstances" for "police torture or other abuse").

I think it would be no less "clear to a reasonable officer" that attempting, however unsuccessfully, to obtain information from Arar under abusive conditions of confinement and interrogation, and then outsourcing his further questioning under torture to the same end, is "unlawful." The defendants here had "fair warning that their alleged treatment of [Arar] was unconstitutional." *Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)*. I would therefore conclude that they are not entitled to qualified immunity at this stage of the proceedings.

It may seem odd that after all the deliberation that has been expended in deciding this case at the trial and appellate levels, I can conclude that the constitutional violation is clear. But it is the availability of a Bivens action that has been the focus of controversy. Perhaps no federal agent could foretell that he or she would be subject to one. That, though, is not the question. The question is whether the unconstitutional nature of the conduct was clear. I think that it was.

E. Summary

In my view, then:

First, Arar's factual allegations -- beginning with his interception, detention, and FBI interrogation at JFK Airport, and continuing through his forced transportation to Syria in order that he be questioned under torture -- must be considered in their entirety and as a whole.

Second, that conduct is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lombardi, 485 F.3d at 79* (citations and internal quotation marks omitted). Arar therefore alleges a violation of his right to substantive due process.

Third, he may seek to recover the damages allegedly thus incurred in a Bivens action.

Finally, although a reasonable government official may have wondered whether a Bivens action was available as a means for Arar to redress his rights allegedly infringed, insofar as any one of them was responsible for his treatment as a whole, he or she could not have reasonably thought that his or her behavior was constitutionally permissible and is therefore not entitled to qualified immunity, at least at this stage of the proceedings.

The defendants' actions as alleged in the complaint, considered together, constitute a violation of Arar's *Fifth Amendment* right to substantive due process committed by government agents acting in the United States under color of federal authority. Whether Arar can establish, even in the teeth of the state-secrets doctrine, properly applied, the truth of the allegations of his mistreatment (including causation and damages), should be tested in discovery proceedings, at the summary-judgment phase, and perhaps at trial.

V. CONCLUDING OBSERVATION

I have no reason whatever to doubt the seriousness of the challenge that terrorism poses to our safety and well-being. See generally, e.g., Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century (2008). During another time of national challenge, however, Justice Jackson, joined by Justice Frankfurter, dissented from the Supreme Court's decision that the due process rights of an un-

admitted alien were not violated when he was kept indefinitely on Ellis Island without a hearing. See *Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953).* The alien's entry had been determined by the Attorney General to "be prejudicial to the public [*216] interest for security reasons," *id. at 208*, and he had therefore been excluded from the United States. Although Mezei was an immigration case with little bearing on the matter before us today, Justice Jackson's observations then, at a time when we thought ourselves in imminent and mortal danger from international Communism, see, e.g., *United States v. Dennis, 183 F.2d 201, 213 (2d Cir. 1950)* (L. Hand,.J.), aff'd, *341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951)*, are worth repeating now:

> The Communist conspiratorial technique of infiltration poses a problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else.

Shaughnessy, 345 U.S. at 227 (Jackson, J., dissenting).[34]

When it came to protection of the United States from then-perceived threats from abroad, Jackson was no absolutist. See *American Communications Ass'n v. Douds, 339 U.S. 382, 422-52, 70 S. Ct. 674, 94 L. Ed. 925 (1950)* (Jackson, J., concurring in part and dissenting in part) (addressing the threat of international Communism); *Terminiello v. City of Chicago, 337 U.S. 1, 37, 69 S. Ct. 894, 93 L. Ed. 1131 (1949)* (Jackson, J., dissenting) (warning that if "if the Court does not temper its doctrinaire logic [as to freedom of speech] with a little practical wisdom," there is a danger that "it will convert the constitutional *Bill of Rights* into a suicide pact"). But with respect to the government's treatment of Mr. Mezei, he concluded: "It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone." *Shaughnessy,*

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[34] The Supreme Court very recently observed:

> Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint....

Boumediene v. Bush, No. 06-1195, slip op. at 68-69, 128 S. Ct. 2229, 171 L. Ed. 2d 41, 2008 U.S. LEXIS 4887, at *127, 2008 WL 2369628, at *46 (U.S. June 12, 2008).

345 U.S. at 227 (Jackson, J., dissenting). I think Justice Jackson's observations warrant careful consideration at the present time and under present circumstances.

APPENDIX C – ENTERED February 16, 2006

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-04-0249 (DGT) (VVP)

414 F. Supp. 2d 250

February 16, 2006, Decided

MAHER ARAR,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, formerly Attorney General of the United States; LARRY D. THOMPSON, formerly Acting Deputy Attorney General; TOM RIDGE, formerly Secretary for Homeland Security; JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services; J. SCOTT BLACKMAN, formerly Regional Director of the Eastern Regional Office of the Immigration and Naturalization Service; PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement; EDWARD J. McELROY, formerly District Director of Immigration and Naturalization Services for New York District and now District Director of Immigration and Customs En-

forcement; ROBERT MUELLER, Director of the Federal Bureau of Investigation; and JOHN DOES 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, Defendants.

Defendants

MEMORANDUM AND ORDER

TRAGER, J.

Plaintiff Maher Arar brings this action against defendants, U.S. officials, who allegedly held him virtually incommunicado for thirteen days at the U.S. border and then ordered his removal to Syria for the express purpose of detention and interrogation under torture by Syrian officials. He brings claims under the Torture Victim Prevention Act and the *Fifth Amendment to the U.S. Constitution.*

Defendants have filed motions to dismiss the complaint pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. The questions presented by these motions are whether the facts alleged can give rise to any theory of liability under those provisions of law and, if so, whether those claims can survive on prudential grounds in light of the national-security and foreign policy issues involved.

Background

All statements contained in parts (1) through (4) in this background section of the opinion are taken from the complaint, attached exhibits, or documents referred to in the complaint and are presumed true for the limited purposes of these motions to dismiss. The alleged facts will be presented as they have been pled and will be borrowed liberally from the complaint.

(1)

Plaintiff Maher Arar ("Arar" or "plaintiff") is a 33-year-old native of Syria who immigrated to Canada with his family when he was a teenager. He is a dual citizen of Syria and Canada and presently resides in Ottawa. In September 2002, while vacationing with family in Tunisia, he was called back to work by his employer to consult with a prospective client. He purchased a return ticket to Montreal with stops in Zurich and New York and left Tunisia on September 25, 2002.

[*253] On September 26, 2002, Arar arrived from Switzerland at John F. Kennedy Airport ("JFK Airport") in New York to catch a connecting flight to Montreal. Upon presenting his passport to an immigration inspector, he was identified as "the subject of a . . . lookout as being a member of a known terrorist organization." Complaint ("Cplt.") Ex. D (Decision of J. Scott Blackman, Regional Director) at 2. He was

interrogated by various officials for approximately eight hours. The officials asked Arar if he had contacts with terrorist groups, which he categorically denied. Arar was then transported to another site at JFK Airport, where he was placed in solitary confinement. He alleges that he was transported in chains and shackles and was left in a room with no bed and with lights on throughout the night.

The following morning, September 27, 2002, starting at approximately 9:00 a.m., two FBI agents interrogated Arar for about five hours, asking him questions about Osama bin Laden, Iraq and Palestine. Arar alleges that the agents yelled and swore at him throughout the interrogation. They ignored his repeated requests to make a telephone call and see a lawyer. At 2:00 p.m. that day, Arar was taken back to his cell, chained and shackled and provided a cold McDonald's meal - his first food in nearly two days.

That evening, Arar was given an opportunity to voluntarily return to Syria, but refused, citing a fear of being tortured if returned there and insisting that he be sent to Canada or returned to Switzerland. An immigration officer told Arar that the United States had a "special interest" in his case and then asked him to sign a form, the contents of which he was not allowed to read. That evening, Arar was transferred, in chains and shackles, to the Metropolitan Detention Center ("MDC") in Brooklyn, New York, where he was strip-searched and placed in solitary confinement. During his initial three days at

MDC, Arar's continued requests to meet with a lawyer and make telephone calls were refused.

On October 1, 2002, the Immigration and Naturalization Service ("INS") initiated removal proceedings against Arar, who was charged with being temporarily inadmissible because of his membership in al Qaeda, a group designated by the Secretary of State as a foreign terrorist organization. Upon being given permission to make one telephone call, Arar called his mother-in-law in Ottawa, Canada.

Upon learning Arar's whereabouts, his family contacted the Office for Consular Affairs ("Canadian Consulate") and retained an attorney, Amal Oummih, to represent him. The Canadian Consulate had not been notified of Arar's detention. On October 3, 2002, Arar received a visit from Maureen Girvan from the Canadian Consulate, who, when presented with the document noting Arar's inadmissibility within the U.S., assured Arar that removal to Syria was not an option. On October 4, 2002, Arar designated Canada as the country to which he wished to be removed.

On October 5, 2002, Arar had his only meeting with counsel. The following day, he was taken in chains and shackles to a room where approximately seven INS officials questioned him about his reasons for opposing removal to Syria. His attorney was not provided advance notice of the interrogation, and Arar further alleges that U.S. officials misled him

into thinking his attorney had chosen not to attend. During the interrogation, Arar continued to express his fear of being tortured if returned to Syria. At the conclusion of the six-hour interrogation, Arar was informed that the officials were discussing his case with "Washington, D.C." Arar was asked to sign a document that appeared to [*254] be a transcript. He refused to sign the form.

The following day (October 7, 2002), attorney Oummih received two telephone calls informing her that Arar had been taken for processing to an INS office at Varick Street in Manhattan, that he would eventually be placed in a detention facility in New Jersey and that she should call back the following morning for Arar's exact whereabouts. However, Arar alleges that he never left MDC and that the contents of both of these phone calls to his counsel were false and misleading.

That same day, October 7, 2002, the INS Regional Director, J. Scott Blackman, determined from classified and unclassified information that Arar is "clearly and unequivocally" a member of al Qaeda and, therefore, "clearly and unequivocally inadmissible to the United States" under *8 U.S.C. § 1182(a)(3)(B)(i)(V)*. *See* Cplt. Ex. D. at 1, 3, 5. Based on that finding, Blackman concluded "that there are reasonable grounds to believe that [Arar] is a danger to the security of the United States." *Id.* at 6.

At approximately 4:00 a.m. on October 8, 2002, Arar learned that, based on classified information, INS regional director Blackman had ordered that Arar be sent to Syria and that his removal there was consistent with Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"). Arar pleaded for reconsideration but was told by INS officials that the agency was not governed by the "Geneva Conventions" and that Arar was barred from reentering the country for a period of five years and would be admissible only with the permission of the Attorney General.

Later that day, Arar was taken in chains and shackles to a New Jersey airfield, where he boarded a small jet bound for Washington, D.C. From there, he was flown to Amman, Jordan, arriving there on October 9, 2002. He was then handed over to Jordanian authorities, who delivered him to the Syrians later that day. At this time, U.S. officials had not informed either Canadian Consulate official Girvan or attorney Oummih that Arar had been removed to Syria. Arar alleges that Syrian officials refused to accept Arar directly from the United States.

Arar's Final Notice of Inadmissibility ("Final Notice") ordered him removed without further inquiry before an immigration judge. *See* Cplt. Ex. D. According to the Final Notice: "The Commissioner of the Immigration and Naturalization Service has determined that your removal to Syria would be consis-

tent with [CAT]." *Id.* It was dated October 8, 2002, and signed by Deputy Attorney General Larry Thompson. After oral argument on these motions to dismiss, in a letter dated August 18, 2005, counsel for Arar clarified that he received the Final Notice within hours of boarding the aircraft taking him to Jordan. *See* Dkt. No. 93.

(2)

During his ten-month period of detention in Syria, Arar alleges that he was placed in a "grave" cell measuring six-feet long, seven feet high and three feet wide. The cell was located within the Palestine Branch of the Syrian Military Intelligence ("Palestine Branch"). The cell was damp and cold, contained very little light and was infested with rats, which would enter the cell through a small aperture in the ceiling. Cats would urinate on Arar through the aperture, and sanitary facilities were nonexistent. Arar was allowed to bathe himself in cold water once per week. He was prohibited from exercising and was provided barely edible food. Arar lost forty pounds during his ten-month period of detention in Syria.

[*255] During his first twelve days in Syrian detention, Arar was interrogated for eighteen hours per day and was physically and psychologically tortured. He was beaten on his palms, hips and lower back with a two-inch-thick electric cable. His captors also used their fists to beat him on his stomach, face

and back of his neck. He was subjected to excruciating pain and pleaded with his captors to stop, but they would not. He was placed in a room where he could hear the screams of other detainees being tortured and was told that he, too, would be placed in a spine-breaking "chair," hung upside down in a "tire" for beatings and subjected to electric shocks. To lessen his exposure to the torture, Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan, even though he had never been to Afghanistan and had never been involved in terrorist activity.

Arar alleges that his interrogation in Syria was coordinated and planned by U.S. officials, who sent the Syrians a dossier containing specific questions. As evidence of this, Arar notes that the interrogations in the U.S. and Syria contained identical questions, including a specific question about his relationship with a particular individual wanted for terrorism. In return, the Syrian officials supplied U.S. officials with all information extracted from Arar; plaintiff cites a statement by one Syrian official who has publicly stated that the Syrian government shared information with the U.S. that it extracted from Arar. *See* Cplt. Ex. E (January 21, 2004 transcript of CBS's *Sixty Minutes II:* "His Year In Hell").

(3)

The Canadian Embassy contacted the Syrian government about Arar on October 20, 2002, and, the

following day, Syrian officials confirmed that they were detaining him. At this point, the Syrian officials ceased interrogating and torturing Arar.

Canadian officials visited Arar at the Palestine Branch five times during his ten-month detention. Prior to each visit, Arar was warned not to disclose that he was being mistreated. He complied but eventually broke down during the fifth visit, telling the Canadian consular official that he was being tortured and kept in a grave.

Five days later, Arar was brought to a Syrian investigation branch, where he was forced to sign a confession stating that he had participated in terrorist training in Afghanistan even though, Arar states, he has never been to Afghanistan or participated in any terrorist activity. Arar was then taken to an overcrowded Syrian prison, where he remained for six weeks.

On September 28, 2003, Arar was transferred back to the Palestine Branch, where he was held for one week. During this week, he heard other detainees screaming in pain and begging for their torture to end.

On October 5, 2003, Syria, without filing any charges against Arar, released him into the custody of Canadian Embassy officials in Damascus. He was flown to Ottawa the following day and reunited with his family.

Arar contends that he is not a member of any terrorist organization, including al Qaeda, and has never knowingly associated himself with terrorists, terrorist organizations or terrorist activity. He claims that the individual about whom he was questioned was a casual acquaintance whom Arar had last seen in October 2001. He believes that he was removed to Syria for interrogation under torture because of his casual acquaintances with this individual and others believed to be involved in terrorist activity. But Arar contends "on information and belief" that there has never been, nor is there now, any reasonable [*256] suspicion that he was involved in such activity.[68] Cplt. P2.

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[68] Prior to oral argument, counsel for Arar submitted a letter providing supplemental information in support of plaintiff's opposition to the U.S. Government's assertion of state-secrets privilege. *See* Dkt. No. 85 (Letter dated July 27, 2005 from Maria LaHood ("LaHood Letter")). The LaHood Letter contains certain publicly available information arising out of the Canadian Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar.

In that letter, plaintiff's counsel explains that Arar was a potential witness, but not a suspect or target, in an investigation by "Project A-O Canada," a Canadian team investigating terrorist suspects in Ottawa. According to the letter, Arar was contacted by an investigator with Project A-O Canada on January 22, 2002, during which time he was in Tunisia. On January 25, Arar told the investigator "he could perhaps be available" on Monday, July 28 for an interview. *See* LaHood Letter at 2. Later that day, however, Arar's attorney "contacted the investigator to advise him that there would need to be parameters for the interview." *Id.* at 2-3. The attorney "requested that the interview take place in his office and that Mr. Arar's statement not be used in proceedings as a substitution for his actual testimony; clearly the information gathered could be used for the

Arar alleges that he continues to suffer adverse effects from his ordeal in Syria. He claims that he has trouble relating to his wife and children, suffers from nightmares, is frequently branded a terrorist and is having trouble finding employment due to his reputation and inability to travel in the United States.

(4)

The complaint alleges on information and belief that Arar was removed to Syria under a covert U.S. policy of "extraordinary rendition," according to which individuals are sent to foreign countries to undergo methods of interrogation not permitted in the United States. The extraordinary rendition policy involves the removal of "non-U.S. citizens detained in

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investigation, and nothing would preclude calling Mr. Arar to testify." *Id.* at 3. As a result of these conditions - which were shared with U.S. officials - and because the investigation wound up focusing on other areas, Arar was never contacted again for an interview. *See id.* The LaHood letter claims that, in light of plaintiff's decision to exercise his constitutional right to remain silent, which was known to U.S. officials, Arar's interrogation within the United States took place in disregard of Arar and his attorney's request.

To some extent, the contents of the LaHood letter undermine plaintiff's claim, "on information and belief," that there has never been, nor is there now, any reasonable suspicion that he was involved in such activity. Although the account of what occurred in the Canadian investigation could not give rise to an adverse inference in a criminal prosecution, the change in Arar's posture would certainly justify at least some suspicion (and perhaps reasonable suspicion) on the part of U.S. officials during their investigation about Arar's activities.

this country and elsewhere and suspected - reasonably or unreasonably - of terrorist activity to countries, including Syria, where interrogations under torture are routine." Cplt. P24. Arar alleges on information and belief that the United States sends individuals "to countries like Syria precisely because those countries can and do use methods of interrogation to obtain information from detainees that would not be morally acceptable or legal in the United States and other democracies." *Id.* The complaint further alleges that "these officials have facilitated such human rights abuses, exchanging dossiers with intelligence officials in the countries to which non-U.S. citizens are removed." *Id.* The complaint also alleges that the U.S. involves Syria in its extraordinary rendition program to extract counter-terrorism information.

This extraordinary rendition program is not part of any official or declared U.S. public policy; nevertheless, it has received [*257] extensive attention in the press, where unnamed U.S. officials and certain foreign officials have admitted to the existence of such a policy. Plaintiff details a number of articles in the mainstream press recounting both the incidents of this particular case and the extraordinary rendition program more broadly. These articles are attached as Exhibit C of his complaint.

Arar alleges that defendants directed the interrogations by providing information about Arar to Syrian officials and receiving reports on Arar's re-

sponses. Consequently, the defendants conspired with, and/or aided and abetted, Syrian officials in arbitrarily detaining, interrogating and torturing Arar. Plaintiff argues in the alternative that, at a minimum, defendants knew or at least should have known that there was a substantial likelihood that he would be tortured upon his removal to Syria.

(5)

Arar's claim that he faced a likelihood of torture in Syria is supported by U.S. State Department reports on Syria's human rights practices. *See, e.g.*, Bureau of Democracy, Human Rights, and Labor, United States Department of State, 2004 Country Reports on Human Rights Practices (Released February 28, 2005) ("2004 Report"). According to the State Department, Syria's "human rights record remained poor, and the Government continued to commit numerous, serious abuses . . . including the use of torture in detention, which at times resulted in death." 2004 Report at 1. Although the Syrian constitution officially prohibits such practices, "there was credible evidence that security forces continued to use torture frequently." *Id.* at 2. The 2004 report cites "numerous cases of security forces using torture on prisoners in custody." *Id.* Similar references throughout the 2004 Report, as well as State Department reports from prior years, are legion. *See, e.g.*, Cplt. Ex. A (2002 State Department Human Rights Report on Syria).

(6)

Arar seeks both declaratory and monetary relief. With respect to declaratory relief, he has sued John Ashcroft, Robert Mueller, Tom Ridge and Paula Corrigan in their official capacities. The United States has moved to dismiss these claims under *Rule 12(b)(1)* for lack of subject-matter jurisdiction and under *Rule 12(b)(6)* for failure to state a claim upon which relief can be granted.

With respect to monetary relief, Arar has sued John Ashcroft, Robert Mueller, J. Scott Blackman, James W. Ziglar, Edward J. McElroy and Larry D. Thompson in their personal capacities. Each of these defendants has filed a separate motion to dismiss these claims under *Rules 12(b)(1)* and *12(b)(6)*.

The complaint also names ten John Doe law enforcement agents employed by the FBI or INS who, singly or collectively, subjected Arar to coercive and involuntary custodial interrogation and unreasonably harsh and punitive conditions of detention.

Discussion

Arar raises four claims for relief.

First, he alleges that defendants violated the Torture Victim Prevention Act by conspiring with and/or aiding and abetting Jordanian and Syrian officials to bring about his torture (Count 1).

Second, Arar alleges that defendants violated his rights under the *Fifth Amendment to the U.S. Constitution* ("*Fifth Amendment*") by knowingly and intentionally subjecting him to torture and coercive interrogation in Syria (Count 2).

Third, Arar alleges that as a result of the actions of the defendants, he was subjected to arbitrary and indefinite detention in Syria, including the denial of access to [*258] counsel, the courts and his consulate, all of which also violated the *Fifth Amendment* (Count 3).

Fourth, Arar alleges that he suffered outrageous, excessive, cruel, inhumane and degrading conditions of confinement in the United States, was subjected to coercive and involuntary custodial interrogation and deprived of access to lawyers and courts, in violation of the *Fifth Amendment* (Count 4). Although Arar's complaint also alleges that defendants violated "treaty law," he appears to have abandoned any such claims in the subsequent briefing.

As clarified at oral argument, Arar seeks a declaratory judgment with respect to Counts 2, 3 and 4 and compensatory and punitive damages with respect to all four counts.

(1)

Standards

a. 12(b)(1)

A motion to dismiss under *Rule 12(b)(1)* tests the jurisdictional basis for the underlying complaint. Under *Rule 12(b)(1)*, a "plaintiff has the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists." *Lunney v. U.S., 319 F.3d 550, 554 (2d Cir. 2003).* When defendants move to dismiss under *Rule 12(b)(1)*, "a court accepts as true all the factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff." *Id.*

b. 12(b)(6)

A motion to dismiss for failure to state a claim under *Rule 12(b)(6)* tests the legal sufficiency of a complaint. Under *Rule 12(b)(6)*, a "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984). See Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)* ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

(2)

Declaratory Relief

Arar seeks a declaration that his detention in the United States and his detention and torture in Syria violated his rights under the *Due Process Clause of the U.S. Constitution*. The United States (or the "government"), on behalf of the defendants sued in their official capacities,[69] argues that Arar lacks standing to bring a claim for declaratory relief because the challenged activity is neither ongoing nor likely to impact him in the future. The government further argues that the injuries for which Arar seeks declaratory relief are not redressable or fairly traceable to the underlying actions Arar challenges in this lawsuit.

In *Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)*, the Supreme Court articulated three elements necessary to establish Article III standing:

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[69] Claims against official-capacity defendants "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985)* (citing *Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978)*). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id. at 166, 105 S.Ct. at 3105.*

> First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete [*259] and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'". . . Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . trace [able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." . . .

Id. at 560-61, 112 S.Ct. at 2136 (citations and footnote omitted).

In his opposition brief, and as clarified at oral argument, Arar states that he seeks a declaratory judgment invalidating his domestic detention as well as his removal to, and torture in, Syria. At the same time, however, Arar contends that his only continuing injury is a five-year bar to reentry. Defendants argue that this injury is untethered to the detention, torture and unlawful conditions of confinement at the heart of this suit and that, therefore, Arar's claim for declaratory relief fails to satisfy the requisite constitutional minima needed for Article III standing.

Plaintiff argues that *Swaby v. Ashcroft, 357 F.3d 156 (2d Cir. 2004)*, establishes his standing to sue. In *Swaby*, a deported alien brought a habeas petition challenging the determination that he was ineligible for a waiver of deportation. The government argued that Swaby's deportation, which occurred before he filed suit, rendered it moot, but the Second Circuit held that the deportation would not moot any "immigration appeal or a collateral attack on an order of removal." *Id. at 160, n.8.* The Second Circuit reasoned that a favorable ruling on the merits would vacate the order of removal, rendering the petitioner eligible to return to the United States. In that regard, his lifetime bar from reentering the United States constituted an "actual injury" with "a sufficient likelihood of being redressed by the relief petitioner seeks from this Court." *Id. at 160.*

The circumstances of *Swaby* are not present here. At the outset, Arar avers in his opposition brief that he "does not challenge his removal order." Pl. Mem. at 15. Moreover, he "does not complain about the decision to classify him as inadmissible into the United States." *Id.* at 13. Thus, any judgment declaring unlawful the conditions of his detention or his removal to Syria would not alter in any way his ineligibility to reenter this country. Consequently, Arar's claim for declaratory relief fails to meet the requirement in *Lujan* that it be "'likely,' as opposed to merely 'speculative,' that the injury" - for these purposes, the bar to reentry - would "be 'redressed by a favorable decision.'" *Id. at 561, 112 S.Ct. at 2136*

(citations and footnote omitted).[70] Arar's request for declaratory relief is therefore denied with respect to all counts, and all claims against defendants sued in their official capacities are dismissed.[71]

(3)

Torture Victim Protection Act

Count 1 of plaintiff's complaint alleges that the individually named defendants [*260] violated the Torture Victim Protection Act (or "TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992) (codified as Note to *28 U.S.C. § 1350*), by conspiring with and/or aiding and abetting unnamed Jordanian and Syrian officials in bringing about Arar's torture in Syria.[72]

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[70] There is also a serious question whether Arar satisfies the traceability requirement, given that the five-year bar to reentry did not result from Arar's detention or the alleged mistreatment he suffered abroad. Thus, it would appear that his claim for declaratory relief would fail to demonstrate "a causal connection between the injury and the conduct complained of." *Lujan, 504 U.S. at 560, 112 S.Ct. at 2136* (citation omitted).

[71] For the remainder of this opinion, the remaining defendants, all of whom are sued in their individual capacities, will be referred to collectively as "defendants."

[72] With respect to the Torture Victim Protection Act, the United States would appear to be protected by sovereign immunity, given that it has not consented to be sued in this matter. *United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767, 769, 85 L. Ed. 1058 (1941)* ("The United States, as sovereign, is immune from suit save as it consents to be sued"). In any event, it appears that plaintiff's Torture Victim Protection Act claims

The Torture Victim Protection Act was enacted in 1992 to provide a cause of action in cases of officially sanctioned torture and extrajudicial killing. It states:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

TVPA § 2(a). Torture is defined under the TVPA as

> any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual

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are brought exclusively against defendants in their individual capacities. *See* Pl. Mem. 39-54.

> for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

TVPA § 3(b)(1). The statute requires that all adequate and available local remedies be exhausted, *see id.* § 2(b). There does not seem to be any dispute that Arar is without any adequate, alternative remedy in Syria. Finally, it imposes a ten-year statute of limitations, *see id.* § 2(c)).

a. Subject Matter Jurisdiction

The Torture Victim Protection Act is appended as a statutory note to the Alien Tort Claims Act ("ATCA"), codified at *28 U.S.C. § 1350.* However, unlike the ATCA, the TVPA does not in itself supply a jurisdictional basis for Arar's claim. As the Second Circuit noted in *Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995),* the Torture Victim Protection Act, "unlike the Alien Tort [Claims] Act, is not itself a jurisdictional statute." *See Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. LEXIS 3293, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *3 (S.D.N.Y. Feb. 28, 2002)* ("The TVPA works in conjunction with the ATCA, expanding the ATCA's reach to torts committed against United States citizens (not just 'aliens') who, while in a foreign country, are victims of torture or 'extrajudicial killing.'").

In *Kadic,* the Second Circuit held that "the Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort [Claims] Act and also under the general federal question jurisdiction of *section 1331." 70 F.3d 232, 246 (2d Cir. 1995).* Although this statement appears to allow Torture Victim Protection Act plaintiffs to ground their cause of action either under the jurisdiction provided under the ATCA or under *§ 1331,* subsequent case [*261] law creates a more ambiguous picture. After *Kadic,* the Second Circuit notes, without resolving, a split of authority on the issue whether a claim under the Torture Victim Protection Act could be based solely under *§ 1331. See Flores v. Southern Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003).* Moreover, after *Flores,* at least one court within this district has noted that "whether subject matter jurisdiction for a claim asserted under the TVPA must be conferred on this Court through the ATCA or can be based solely on *28 U.S.C. § 1331* is a thorny issue." *Arndt v. UBS AG, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004).*

This ambiguity notwithstanding, there is no proscription against basing Torture Victim Protection Act claims exclusively under *§ 1331.* The language of *Kadic* certainly appears to be consistent with such a notion. In any event, it is only logical that *§ 1331* apply to any action "arising under" federal law. *See Al-Odah v. United States, 355 U.S. App. D.C. 189, 321 F.3d 1134, 1146 (D.C. Cir. 2003)*

(Randolph, J., concurring) ("The Torture Victim Act does not contain its own jurisdictional provision. But it is clear that any case brought pursuant to that statute would arise under federal law and thus come within *28 U.S.C. § 1331*, the grant of general federal question jurisdiction."), *rev'd on other grounds, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004)*; *Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D. Mass. 1995)* (permitting plaintiff to pursue Torture Victim Protection Act claims directly under *§ 1331*).[73]

b. Secondary Liability

The *Torture Victim Protection Act* does not specifically grant a right of action against those who aid or abet, or conspire with, primary violators. Noting this, defendants argue that only primary, not secondary, violators are liable. But every court construing this question has reached the contrary outcome, holding that the TVPA can be interpreted to allow claims for secondary liability. *E.g., Hilao v. Estate of Marcos, 103 F.3d 767, 779 (9th Cir. 1996)*; *Wiwa, 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887, at *16*; *see also Cabello v. Fernandez Larios, 402 F.3d 1148, 1158 (11th Cir. 2005)*. Those courts have reached that conclusion by interpreting the legislative history of the Torture Victim Protection Act.

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[73] It could be that diversity jurisdiction is also present, but plaintiff has chosen not to rely upon it.

Although the plain language of the statute does not expressly call for secondary liability, its legislative history offers proof of an intention to impose it. As noted in the Senate Report, "a higher official need not have personally performed or ordered the abuses in order to be held liable . . . anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them." S.Rep. No. 249 ("TVPA Senate Report"), 102d Cong., 1st Sess. at 9 (1991) (footnote omitted).

Defendants rely on *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173, 114 S.Ct. 1439, 1446, 128 L.Ed.2d 119 (1994)*, to support a narrower reading of the Torture Victim Protection Act. In *Central Bank*, the Supreme Court held that *§ 10(b)* of the Securities Exchange Act of 1934, prohibiting manipulative or deceptive practices in connection with securities transactions, does not allow for private suits alleging aiding and abetting liability. *See also Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, 135 F.3d 837 (2d Cir. 1998)* (applying the reasoning of *Central Bank* to preclude conspiracy liability under federal securities law). But the principle enunciated in *Central Bank* [*262] does not, as defendants contend, require an unequivocal congressional mandate before allowing a claim for secondary liability. Rather, the case holds that the scope of liability must be based on a fair reading of statutory text. *Central Bank, 511 U.S. at 175, 114 S.Ct. at 1447* ("Our consideration of statutory duties, especially in cases interpreting *§*

10(b), establishes that the statutory text controls the definition of conduct covered by *§ 10(b)*."); *Dinsmore, 135 F.3d at 844* ("The statutory text . . . was the determinative issue in *Central Bank*, and it controls here as well."). *Accord Wiwa, 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887, at *16* ("Neither *Central Bank* nor *Dinsmore* holds that a statute must explicitly allow for secondary liability in order for a court to hold aiders and abetters or co-conspirators liable. Rather, *Central Bank* and *Dinsmore* support the proposition that the scope of liability under a statute should be determined based on a reading of the text of the specific statute.").

Defendants also fail to note that *Central Bank* involved an aiding and abetting claim in the context of an *implied*, not express, right of action. *See Central Bank, 511 U.S. at 173, 114 S.Ct. at 1446*. The TVPA, by contrast, provides an express cause of action, and thus the link to secondary liability under the Act is less attenuated than would have been the case in *Central Bank*.

Defendants further argue that Arar does not adequately plead the existence of a conspiracy to commit torture or that defendants aided and abetted torture. But Arar's allegations clearly meet the notice-pleading requirements of *Fed. R. Civ. P. 8(a)*, and the allegations of a conspiracy, as well as aiding and abetting liability, are adequately pled. Indeed, a plaintiff need not "yet know the details of the alleged conspiracy" to successfully plead one under liberal

pleading rules. *Brown v. Western Conn. State Univ., 204 F. Supp. 2d 355, 364 (D. Conn. 2002).* At present, the allegations of conspiracy or aiding and abetting liability are sufficient.

b. Custody or Control

Section 3(b)(1) of the Torture Victim Protection Act further requires that a plaintiff be in the offender's "custody or physical control." Defendants argue that this element is lacking because the alleged torture occurred while Arar was in Syrian custody. However, according to the complaint, defendants orchestrated Arar's ordeal by sending him to Syria for the express purpose of being confined and questioned there under torture. Arar alleges that defendants provided the Syrians a dossier on him to be used during interrogations conducted under conditions of torture and that U.S. officials were supplied with information gained from those investigations. *See* Cplt. PP55-56. Such allegations, he argues, sufficiently demonstrate that these actions occurred while he was in defendants' "custody or control."

Plaintiff also cites at least one decision applying a broad interpretation of the "custody or control requirement," *see Xuncax, 886 F. Supp. at 178 n. 15,* and relies on language in the legislative history that "a higher official need not have personally performed or ordered the abuses in order to be held liable. . . ." Pl. Mem. at 61 (citing TVPA Senate Report).

The *Xuncax* court allowed a U.S. citizen to bring a Torture Victim Protection Act claim against a Guatemalan Defense Minister for abuses suffered at the hands of the Guatemalan military forces. However, there is an obvious difference between the vertical control exercised by a higher official over his subordinates, as was the case there, and the degree of custody or control exercised by U.S. officials over Syrian officials, even if, as plaintiff alleges, the Syrians acted at the behest of U.S. officials. [*263] Regardless, the issue of custody or physical control need not be resolved. Assuming, *arguendo,* that defendants can be deemed to have had custody or control of Arar while he was detained and tortured in Syria, his Torture Victim Protection Act claim must still overcome concerns raised by the Torture Victim Protection Act's statutory requirement that the tort be committed under "color of law, of any foreign nation," TVPA § 2(a), as well as implicit limitations on the reach of the TVPA based on other relevant statutory provisions and materials.

c. The Torture Victim Protection Act's Statutory Context

(i) Alien Tort Claims Act

The legislative history to the Torture Victim Protection Act explains that the statute, a statutory note to the ATCA, was intended to provide an explicit grant of a cause of action to victims of torture committed in foreign nations and to extend the rem-

edy under the ATCA to U.S. citizens tortured abroad. "While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad." H.R. Rep. No. 102-367, 102d Cong., 2d Sess. ("TVPA House Report"), at *4 (1991). Numerous cases interpreting the Torture Victim Protection Act have noted this purpose as well. *Enahoro v. Abubakar, 408 F.3d 877, 888 (7th Cir. 2005)* ("While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad."); *Cabello v. Fernandez-Larios, 402 F.3d 1148, 1154 (11th Cir. 2005)* ("The TVPA extended the ATCA, which had been limited to aliens, to allow citizens of the United States to bring suits for torture and extrajudicial killings in United States courts."); *Flores v. S. Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003)* ("the TVPA . . . extend[s] a civil remedy also to U.S. citizens who may have been tortured abroad.") (citation omitted); *Kadic, 70 F.3d at 241* ("Congress enacted the Torture Victim Act to . . . further extend that cause of action to plaintiffs who are U.S. citizens."). The legislative history and these case citations strongly suggest that U.S. citizens, and only U.S. citizens, are covered by the TVPA.

(ii) Foreign Affairs Reform and Restructuring Act (FARRA)

The Torture Victim Protection Act "executes" in part the Convention Against Torture and Other

Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85, G.A. Res. 39/46, 39 (1984), 23 I.L.M. 1027, to which the Senate gave its consent on October 27, 1990. S. Treaty Doc. No. 100-20, 136 Cong. Rec. D 1442 (1990). In addition to enacting the Torture Victim Protection Act and creating a private cause of action for officially sanctioned torture, Congress implemented Article 3 of the CAT by enacting the Foreign Affairs Reform and Restructuring Act of 1988 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681-822 (Oct. 21, 1998) (codified as Note to *8 U.S.C. § 1231*).

Under FARRA, "it shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture. . . ." FARRA § 2242(a). Regulations promulgated under FARRA, *see 8 C.F.R. §§ 208.16-18*, provide that the United States will not send individuals to countries where they are "more likely than not to be tortured. . . ." *8 C.F.R. § 208.16(c)(4)* .

Although FARRA and its regulations are highly relevant to the facts of this case, [*264] plaintiff does not advance any claim under that statute, a decision based no doubt upon the absence of a private cause of action in that statute. To be sure, the absence of a right of action under FARRA sheds light on the Torture Victim Protection Act, specifically with regard to "whether Congress intended to

create a remedy" under the TVPA in situations like *Arar's. California v. Sierra Club, 451 U.S. 287, 297, 101 S.Ct. 1775, 1781, 68 L.Ed.2d 101 (1981)* ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.").

In addition to the absence of any express right of action for damages under FARRA, Congress appears to have foreclosed the possibility of a court implying a cause of action under the statute as well. Evidence for this foreclosure can be found in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). That statute, which *amends 8* U.S.C. *§ 1231*, states that nothing within that section, which includes FARRA (a statutory note to *§ 1231*), "shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." *8 U.S.C. § 1231(h).*

The absence of any private right of action under FARRA, combined with the provision of the Immigration and Nationality Act ("INA") barring any substantive right enforceable against the United States or its officials, forecloses any substantive right under FARRA.[74] That conclusion, moreover, casts

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[74] There is no need to analyze two additional arguments raised by defendants - first, that a cause of action under FARRA (possibly via regulations promulgated under FARRA) is foreclosed because, outside the process of challenging a final

important light on the reach of the Torture Victim Protection Act in this case.[75]

e. Color of Foreign Law

The Torture Victim Protection Act makes clear that individuals are liable only if they have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a). The Second Circuit has held that the "color of law" requirement of the TVPA is "intended to 'make[] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,' and that the statute 'does not attempt to deal with torture or killing by purely private groups.'" *Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)* (citing TVPA House Report, at *5). Plaintiff argues that defendants operated under color of law of a foreign nation by conspiring with, or aiding and abetting, Syrian officials in their unlawful detention and torture of Arar.

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order of removal in the relevant court of appeals, FARRA § (d) presumptively bars federal jurisdiction over other types of claims brought under FARRA like the kind raised here; and second, that FARRA § (c) is not applicable to any alien considered a potential danger to the security of the United States as described in *8 U.S.C. § 1231(b)(3)(B)*.

[75] It is also noteworthy, in this regard, that Congress has specifically chosen to criminalize conspiracy to commit torture. *See 18 U.S.C. § 2340A*. Although this statute applies with full force against U.S. officials, it creates no civil liability.

Defendants argue that they cannot be held liable under the Torture Victim Protection Act because any "law" under which they were acting in this case would be domestic - not foreign - and, therefore, the language in the Torture Victim Protection Act regarding "color of law[] of any foreign nation" does not apply to them.

[*265] Only one court has considered this question to date. That case, *Schneider v. Kissinger, 310 F. Supp. 2d. 251 (D.D.C. 2004), aff'd 366 U.S. App. D.C. 408, 412 F.3d 190 (D.C. Cir. 2005)*, held that a U.S. official acting under the directive of the President of the United States would *ipso facto* act only under auspices of U.S., not foreign, law. *Schneider* involved claims arising out of the CIA's alleged involvement in the anti-Allende coup in Chile. The survivors and personal representative of General Rene Schneider, who was killed during a botched kidnaping by plotters of the 1970 Chilean government coup, sued the United States and former national security advisor Henry A. Kissinger, alleging that President Nixon had ordered Kissinger, the CIA and others to do whatever would be necessary to prevent the election of Dr. Salvadore Allende as Chile's first Socialist President and that Kissinger, apparently unconcerned with the risks involved, allocated $ 10 million to effect a military coup, leading to Schneider's death. *Id. at 255.*

After concluding that the plaintiffs' claims presented non-justiciable political questions, the dis-

trict court went on to briefly consider alternative bases for dismissal, including under the Torture Victim Protection Act. *See id. at 264, n. 13.* In a terse discussion, the district court reasoned that Kissinger could not be held to have acted color of law of a foreign nation. "In carrying out the direct orders of the President of the United States . . . Dr. Kissinger was most assuredly acting pursuant to U.S. law, if any, despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law." *Id. at 267.*

Plaintiff argues that *Schneider* is inapposite because, in that case, Kissinger was acting at the direction of the President, whereas, here, the defendants are not alleged to have acted at the behest of President Bush. However, Arar's complaint alleges unconstitutional conduct by some of the highest policy-making officials of this country, not low-level officers acting on their own. Thus, in this case, as in *Schneider,* the defendants' alleged conduct would have been taken pursuant to U.S., not Syrian, law. Although *Schneider* does not provide extensive analysis of the issue, its analysis would seem applicable here.

Plaintiff contends, nevertheless, that defendants, by acting in conspiracy with foreign officials, can be deemed to have acted under color of foreign law. To support this argument, plaintiff draws upon, by way of analogy, the jurisprudence developed under *42 U.S.C. § 1983.* Plaintiff notes Second Circuit

case law directing courts construing Torture Victim Protection Act claims to interpret the "color of law" requirement in light of *§ 1983. Kadic, 70 F.3d at 245*; TVPA House Report, at *5 ("Courts should look to *42 U.S.C. § 1983* in construing 'color of law' and agency law in construing 'actual or apparent authority.'"). Noting this, plaintiff argues that U.S. officials can be deemed to have acted under color of Syrian law in the same way courts have found federal officials to have acted under color of state law under *§ 1983.*

Indeed, courts have held that, under certain circumstances, joint action between federal and state officials can amount to conduct under color of state law for purposes of *§ 1983.* "When the violation is the joint product of the exercise of a State power and of a non-State power then the test . . . is whether the state or its officials played a 'significant' role in the result." *Kletschka v. Driver, 411 F.2d 436, 449 (2d Cir. 1969). See Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 111 n. 17 (3d Cir. 1986); Knights of the KKK v. East Baton Rouge Parish School Board, 735 F.2d 895, 900 (5th Cir. 1984); Reuber v. U.S., 242 U.S. App. D.C. 370, 750 F.2d 1039, 1061 (D.C. Cir. 1984).*

[*266] *Kletschka* extended to federal officials the reach of prior holdings establishing that private individuals acting jointly with state officers could be held to violate *§ 1983. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963).* The Second Cir-

cuit saw "no reason why a joint conspiracy between federal and state officials should not carry the same consequences under *§ 1983* as does joint action by state officials and private persons." *Kletschka, 411 F.2d at 448.*

However, plaintiff's analogy to *§ 1983* ultimately fails. Preliminarily, it is perfectly reasonable to hold federal officials liable for constitutional wrongs committed under color of state law because federal officials, when acting under color of state law, are still acting under a legal regime established by our constitution and our well-defined jurisprudence in the domestic arena. However, this equation of the duties and obligations of federal officials under state and federal law is ill-suited to the foreign arena. The issues federal officials confront when acting in the realm of foreign affairs may involve conduct and relationships of an entirely different order and policy-making on an entirely different plane. In the realm of foreign policy, U.S. officials deal with unique dangers not seen in domestic life and negotiate with foreign officials and individuals whose conduct is not controlled by the standards of our society. The negotiations are often more delicate and subtle than those occurring in the domestic sphere and may contain misrepresentations that would be unacceptable in a wholly domestic context. Thus, it is by no means a simple matter to equate actions taken under the color of state law in the domestic front to conduct undertaken under color of foreign law. That arena is animated by different interests and issues.

Applying the logic of *Kletschka* to the Torture Victim Protection Act breaks down for another reason. Federal officials, in order to be held liable under *§ 1983* for joint action with state officials, must act "under the control or influence of the State defendants"; otherwise, *§ 1983* liability is lacking. *Id. at 449*. Indeed, where federal officials direct state officers to violate federal law, *§ 1983* liability will not be found. *See Billings v. United States, 57 F.3d 797, 801 (9th Cir. 1995)* (affirming dismissal of *§ 1983* claims against county officials who "were clearly acting at the behest and under the direction of the federal agents" and noting that any joint action between the two would have arisen under color of federal, not state, law). Thus, plaintiff's analogy works only if Syrian officials ordered U.S. officials to torture Arar, not vice versa - as alleged.

f. Conclusion

The decision by Congress not to provide a private cause of action under FARRA for individuals improperly removed to countries practicing torture militates against creating one in this case under the Torture Victim Protection Act. Moreover, the color of "foreign law" requirement, combined with the intent by Congress to use the Torture Victim Protection Act as a remedy for U.S. citizens subjected to torts committed overseas, strongly supports defendants' claim that the Torture Victim Protection Act does not apply here. In conclusion, plaintiff does not meet the statutory requirements of the Torture Victim Protection

Act, and, accordingly, Count 1 of the complaint is dismissed.

(4)

Due Process Claims for Detention and Torture in Syria

Counts 2 and 3 of plaintiff's complaint allege that defendants violated Arar's [*267] rights to substantive due process by removing him to Syria and subjecting him to both torture and coercive interrogation (Count 2) and arbitrary and indefinite detention (Count 3). He seeks damages under *Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971),* claiming deprivation of *Fifth Amendment* due process rights.

Bivens establishes "that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green, 446 U.S. 14, 18, 100 S.Ct. 1468, 1471, 64 L.Ed.2d 15 (1980).* The threshold inquiry is whether Arar alleges a violation of federal law that can be vindicated in his *Bivens* claim. Preliminarily, however, defendants argue that there is no subject-matter jurisdiction to even consider the substance of Arar's complaint. That jurisdictional argument will be taken up first.

a. Jurisdiction

Defendants argue that, under the INA, this court is without jurisdiction to consider any claims arising out of Counts 2 and 3 of the complaint and that any and all questions involving Arar's transfer, detention and torture in Syria - including constitutional claims - must be dismissed. Defendants rely on three provisions of the INA, as amended by IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), all of which purportedly preclude subject-matter jurisdiction. They also point to one provision of FARRA that would divest this court of jurisdiction as well.

The three separate provisions upon which defendants rely are: (1) *8 U.S.C. § 1252(b)(9)*, the "zipper clause," which channels all questions of law and fact arising from removal proceedings to the federal courts of appeals; (2) *8 U.S.C. § 1252(g)*, which prevents district courts from exercising subject-matter jurisdiction over the Attorney General's decision to execute removal orders; and (3) *8 U.S.C. § 1252(a)(2)(B)(ii)*, which bars judicial review of "any" discretionary decision of the Attorney General covered by applicable provisions of Title 8 of the U.S. Code. According to defendants, IIRIRA expands the withdrawal of federal question jurisdiction by channeling judicial review of the execution of removal orders to the circuit courts of appeals (*8 U.S.C. § 1252(g)*), consolidates in the courts of appeals all legal and factual questions arising from said removal proceedings (*8 U.S.C. § 1252(b)(9)*), and bars federal

jurisdiction altogether for discretionary decisions of any kind (*8 U.S.C. § 1252 (a)(2)(B)(ii)*). Finally, defendants point to FARRA, § 2242(d), which strips all federal court jurisdiction over claims brought under the CAT except as part of a final order of removal in a court of appeals.

Any analysis of these provisions must start with the proposition that they be interpreted in light of "the strong presumption in favor of judicial review of administrative action," *INS v. St. Cyr, 533 U.S. 289, 298, 121 S.Ct. 2271, 2278, 150 L.Ed.2d 347 (2001)*, as well as the "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Id. at 320, 121 S.Ct. at 2290* (quoting *INS v. Cardoza-Fonseca, 480 U.S. 421, 449, 107 S.Ct. 1207, 1222, 94 L.Ed.2d 434 (1987)*). Finally, "where Congress intends to preclude judicial review of constitutional claims [of aliens] its intent to do so must be clear." *Demore v. Kim, 538 U.S. 510, 517, 123 S.Ct. 1708, 1714, 155 L.Ed.2d 724 (2003)* (citing *Webster v. Doe, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053, 100 L.Ed.2d 632 (1988)*).

[*268] The INA provisions cited by defendants are designed to create a streamlined procedure allowing for the effective administration of the immigration laws so that the removal of illegal aliens can proceed with as much alacrity as possible while maintaining a minimum of procedural due process. According to defendants, these provisions apply because Counts 2 and 3 of the complaint, "at their

core," challenge Arar's removal order. *See, e.g.*, Ashcroft Mem. at 19. Arar, by contrast, insists that Counts 2 and 3 raise issues collateral to the removal order, directly challenging his detention, transfer and torture in Syria. Thus, the applicability of the three provisions turns on this deep disagreement about the precise nature of Counts 2 and 3.

Defendants' attempt to redefine this action as a simple challenge to circumstances "arising out of" Arar's removal is not persuasive. That Arar's complaint goes beyond his removal is evidenced not least by the fact that he *requested* removal - to Canada. Thus, this case does not concern *why* defendants might have chosen to send Arar to Syria; neither does Arar appear to attack the bases for sending him there. Rather, this case concerns whether defendants could legally send Arar to a country where they knew he would be tortured and arbitrarily detained or where they knew there was a strong possibility of such a fate. As Arar argues, this case attacks a *policy* under which he was sent to a country, either in spite of, or perhaps because of, the likelihood that he would be tortured upon arrival.

But even on defendants' account of the nature of this suit, it remains the case that Arar's only available remedy under the INA would have been an order seeking his return. That remedy would have had no bearing on his detention and coercive interrogation, which would cease only if, and when, immigration authorities were capable of effecting his re-

lease. This case thus raises a serious question whether the procedural system administrating the admission and exclusion of aliens is truly capable of remedying the alleged torture and detention.

Nevertheless, defendants insist that the above-cited provisions of the INA bar Counts 2 and 3. Assuming the applicability of those provisions, they still do not preclude subject-matter jurisdiction for the reasons explained below.

(i) *8 U.S.C. § 1252(b)(9)*

Section 1252(b)(9) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section.

According to defendants, *§ 1252(b)(9)* deprives this court of jurisdiction to consider Counts 2 and 3 because those claims involve actions "arising from" removal proceedings and can therefore only be heard by a court of appeals upon a petition for review of a final order of removal. *See, e.g.*, Ashcroft Mem. at 22 ("the heart of Arar's complaint involves his removal to Syria rather than a country where he alleges he would have been treated more humanely").

Arar claims that *§ 1252(b)(9)* has no application because, in fact, he does not contest the underlying removal order as such. Rather, he alleges a conspiracy by defendants to detain him without formal charges and to render him to Syria for interrogation under torture. As I have already indicated, these allegations are separate from, and collateral to, the underlying removal order under which he was deported.

[*269] Moreover, the very citation of this "zipper clause" assumes the availability of certain kinds of relief that were not present here. Most immigration petitioners have the opportunity to challenge their removal at a hearing, with the ability to be represented by counsel, where they can raise legal claims, including those with respect to CAT. These proceedings include, at a minimum, a hearing before an immigration judge, an appeal before the Board of Immigration Appeals and, finally, review in the relevant U.S. court of appeals. In this case, Arar alleges that he was intentionally deprived of the opportunity to obtain adequate review over his CAT claim. Moreover, he alleges he was denied access to counsel while held in the United States and then transported to Syria, against his will, where he was held incommunicado and tortured for ten months. If, as Arar alleges, federal officials actually obstructed him from filing a grievance, there is no basis for defendants' claim that *§ 1252(b) (9)* can be interpreted to effectively bar him from any forum to litigate his claim. Certainly, Arar was not in a position similar to ordi-

nary deportees who can "wait until their administrative proceedings come to a close and then seek review in a court of appeals." *Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 479, 119 S.Ct. 936, 941, 142 L.Ed.2d 940 (1999).* Thus, the "zipper clause" defendants invoke to bar this litigation rings hollow.

Defendants cite *Calcano-Martinez v. INS, 232 F.3d 328 (2d Cir. 2000),* in which the Second Circuit noted that because *§ 1252(b)(9)* establishes "'exclusive appellate court' jurisdiction over claims 'arising from any action taken or proceeding brought to remove an alien,' all challenges are channeled into one petition." *Id. at 340* (citing *8 U.S.C. § 1252 (b) (9); see also Flores-Miramontes v. INS, 212 F.3d 1133, 1140-41 (9th Cir. 2000)).* Noting that "all challenges" must now be brought under one petition for review, defendants assert that the current action is foreclosed in this court. But this analysis misreads the holding of *Calcano-Martinez* and mischaracterizes the purpose behind *§ 1252(b)(9).*

Calcano-Martinez held that the jurisdiction-limiting provisions of IIRIRA, including *§ 1252(b)(9),* did not divest district courts of jurisdiction to hear habeas appeals raising legal challenges to removal orders. *232 F.3d at 337, aff'd 533 U.S. 348, 121 S.Ct. 2268, 150 L.Ed.2d 392 (2001).* The petitioners, who enjoyed a full administrative process before the agency, were not precluded from raising legal challenges under habeas. As the Second Circuit ex-

plained in *Calcano-Martinez, § 1252(b)(9)* was intended to resolve certain procedural and administrative problems presented in immigration proceedings. "Before *[§ 1252(b)(9)]*, only actions attacking the deportation order itself were brought in a petition for review while other challenges could be brought pursuant to a federal court's federal question subject matter jurisdiction under *28 U.S.C. § 1331.*" *Id. at 340.* For instance, in *Cheng Fan Kwok v. INS, 392 U.S. 206, 212, 88 S.Ct. 1970, 1974, 20 L.Ed.2d 1037 (1968)*, the Supreme Court held that the statutory precursor to *§ 1252(b)(9)* allowed an alien to institute separate proceedings for a challenge to the denial of a stay of deportation and a challenge to the underlying deportation order itself. After *Cheng Fan Kwok*, parties could initiate separate court proceedings, at times in separate courts, for successive filings in matters ultimately originating out of the same set of circumstances. *See also Flores-Miramontes, 212 F.3d at 1140-41* (noting that, prior to *§ 1252 (b) (9)*, "while motions to reopen were to be brought in the courts of appeal . . . challenges to denials of stays of deportation fell within the jurisdiction of the district courts, under the general federal question statute"). By consolidating [*270] review of all appeals of the removal order itself in one forum, Congress solved the problem of successive filings and additional back-door challenges to removal orders. *Calcano-Martinez, 232 F.3d at 340.* But this action is neither a direct nor back-door challenge to a removal proceeding.

The inapplicability of *§ 1252(b)(9)* to the facts of this case is further highlighted by recent Supreme Court directives regarding the "zipper clause." As the Supreme Court explained in *St. Cyr,* the provision is intended "to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals," not to eliminate judicial review altogether. *533 U.S. at 313, 121 S.Ct. at 2286*; *see Calcano-Martinez, 232 F.3d at 340.* Recent cases interpreting analogous provisions of IIRIRA comport with this understanding. *See American-Arab Anti-Discrimination Committee, 525 U.S. at 485, 119 S.Ct. at 944* (noting, with respect to *§ 1252(g),* Congress's interest in making sure that "certain immigration decisions, "if . . . reviewable at all . . . at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed.").

In light of the purpose behind its enactment as well as the facts attending Arar's removal, *§ 1252(b)(9)* does not bar Arar's suit.

(ii) *8 U.S.C. § 1252(g)*

Section 1252(g) reads as follows:

> Except as provided in this section and notwithstanding any other provision of law . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or

> execute removal orders against any alien under this chapter.

Defendants argue, again, that Counts 2 and 3 are barred because all events "arise from" the execution of Arar's removal order. *See, e.g.*, Ashcroft Mem. at 24 ("Accepting Arar's allegations, the decision which is the subject of Arar's Second and Third *Bivens* claims was 'removing Mr. Arar to Syria' ostensibly for the purpose of his detention and torture by Syrian officials.") (citing Cplt. P48). For the reasons expressed *supra*, that description of the complaint is neither correct nor fair. In any event, the broad reading defendants insert into *§ 1252(g)* is not borne out by the case law. The *American-Arab Anti-Discrimination Committee* court specifically rejected the

> unexamined assumption that *§ 1252(g)* covers the universe of deportation claims -- that it is a sort of "zipper" clause that says "no judicial review in deportation cases unless this section provides judicial review." In fact, what *§ 1252(g)* says is much narrower. The provision applies only to three discrete actions that the Attorney General may take: her "decision or action" to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders."

525 U.S. at 482, 119 S.Ct. at 943 (emphasis in original). *See Calcano-Martinez, 232 F.3d at 339, n.5* (noting that, in *American-Arab Anti-Discrimination Committee,* "the Supreme Court thus held that *[§ 1252(g)]* applies in a very narrow class of cases"). As the Fourth Circuit has explained, the Supreme Court "reasoned that these three actions are stages of the deportation process at which the Executive has discretion to go forward or to abandon the endeavor and that *§ 1252(g)* was designed to prevent judicial intervention into these actions outside the streamlined process Congress had designed." *Mapoy v. Carroll, 185 F.3d 224, 228 (4th Cir. 1999).* In other words, *§ 1252(g),* like *§ 1252(b)(9),* was intended to help restore [*271] order to the administrative process by preventing multiple lawsuits over claims arising from action involving the removal of an alien -- not to foreclose *bona fide* legal and constitutional questions unrelated to the removal order by barring all federal court review.

Even if Arar were challenging the underlying removal order according to which he was transferred to Syria -- as defendants claim -- *§ 1252(g)* would still not apply. Arar challenges, on constitutional grounds, the decision to send him abroad for torture, pursuant to a purported policy of extraordinary rendition for individuals suspected of terrorist involvement. That goes far beyond a mere challenge to the "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders." As noted in *American-Arab Anti-Discrimination Com-*

mittee, it would be "implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *525 U.S. at 482, 119 S.Ct. at 943. See Wong v. INS, 373 F.3d 952, 964 (9th Cir. 2004)* (rejecting government's position with respect to *§ 1252(g)* by finding that the provision does not bar "all claims relating in any way to deportation proceedings") (citing *Catholic Soc. Servs., Inc. v. INS, 232 F.3d 1139, 1150 (9th Cir. 2000)* (en banc)). Consequently, even accepting defendants' characterization of the nature of this suit, *§ 1252(g)* would not bar Counts 2 and 3.

(iii) *8 U.S.C. § 1252(a)(2)(B)(ii)*

Section 1252(a)(2)(B)(ii), provides in relevant part,

> Notwithstanding any other provision of law . . . no court shall have jurisdiction to review--
>
> (i) any judgment regarding the granting of relief under *section 1182(h), 1182(i), 1229b, 1229c,* or *1255* of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the

> Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

"The starting point of the analysis," defendants argue, "is Arar's status as an arriving alien seeking admission." Ashcroft Mem. at 25. Thus, defendants point out, the Attorney General has discretion in deciding what to do with aliens suspected of being involved in terrorism and where to send them -- including the ability to disregard their preferred country of removal. *See* Ashcroft Mem. at 25-27. Under *8 U.S.C. § 1231(b)(2)(C)(IV)*, they point out, the Attorney General "may disregard" an alien's designation of a country of removal if granting the request would be prejudicial to the interests of the United States.

However, Arar was *not* seeking admission to the United States, and, thus, defendants' argument begins from an incorrect "starting point." In any event, *§ 1252(a)(2)(B)(ii)*, which essentially bars judicial review of purely discretionary determinations, is not dispositive.

The Ninth Circuit is the only court of appeals to have thus far analyzed *8 U.S.C. § 1252(a)(2)(B)(ii)* in remotely similar circumstances. In *Wong* the Ninth Circuit rejected the government's position by ruling that "claims of constitutional violations are not barred by *§ 1252(a)(2)(B)*." *373 F.3d at 963.*

Although this circuit has not directly interpreted that provision, a recent case, *Sepulveda v. Gonzales, 407 F.3d 59 (2d Cir. 2005)*, is instructive. In *Sepulveda*, the Second Circuit interpreted *8 U.S.C. § 1252(a)(2)(B)(i)*, which bars federal review of judgments regarding the granting of relief of, *inter alia*, cancellation of removal under *8 U.S.C. § 1229b* and adjustment [*272] of status under *8 U.S.C. § 1255(i)*. The Second Circuit held that the jurisdiction-stripping provision would not bar federal review of nondiscretionary or purely legal questions regarding an alien's eligibility for such relief. Rather, *8 U.S.C. § 1252(a)(2)(B)(i)* only precludes review of *discretionary* determinations to grant or deny relief. *Id. at 62-64*. Because both (i) and (ii) concern varieties of judgments that are otherwise non-justiciable in federal courts, the analysis in *Sepulveda* would apply to subsection (ii) as well. *Santos-Salazar v. United States DOJ, 400 F.3d 99, 104 (2d Cir. 2005)*, interpreting a separate jurisdiction-stripping element of the INA, is equally on point. The Second Circuit noted that, although *8 U.S.C. § 1255(a)(2)(C)* bars federal-court review of final orders of removal based on certain criminal conduct, "there are, however, aspects of *§ 1252(a)(2)(C)* as to which judicial review has not been eliminated." *Id. at 104. Section 1252(a)(2)(C)* "does not deprive the courts of jurisdiction to determine whether the section is applicable, *e.g.*, whether the petitioner is in fact an alien, whether he has in fact been convicted, and whether his offense is one that is within the scope of *8 U.S.C. § 1182(a)(2)*." *Id.* (citations omitted). The *Santos-*

Salazar court ultimately dismissed the action for lack of a substantial constitutional question. Had it found such a question apparent, its discussion indicates that it would have ruled differently.

The maxim that courts retain jurisdiction to consider purely legal questions holds true in other administrative contexts as well. *See Johnson v. Robison, 415 U.S. 361, 367, 94 S.Ct. 1160, 1165-66, 39 L.Ed.2d 389 (1974)* (provision barring review of "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans" did not bar constitutional challenge) (internal quotation marks omitted). *Wong* and *Sepulveda* as well as the Supreme Court cases cited strongly favor jurisdiction over Arar's claims because he does not challenge discretionary decision-making by the Attorney General, but rather constitutional violations incident to his removal to Syria to face torture.

Defendants cite *Doherty v. Meese, 808 F.2d 938, 941 (2d Cir. 1986)*, for the proposition that such determinations are "essentially unreviewable." *Id. at 944*; *see* Ashcroft Mem. at 26. In *Doherty*, an immigration petitioner attempted to short-circuit the government's appeal of the immigration judge's decision granting the petitioner's request to be deported to the country of his choice. The petitioner attempted to block the appeal in the agency by seeking federal court review in the midst of the administrative process. The actual holding of *Doherty* is that, absent ex-

traordinary circumstances, the court of appeals cannot "intervene in the administrative process *prior* to a final order of deportation." *808 F.2d at 942* (emphasis added). Although it is not crystal clear whether the *Doherty* court would have reached the same conclusion regarding its power to review the Attorney General's determination at the *conclusion* of the administrative hearings, *§ 1252(a)(2)(B)(ii)* appears to bar jurisdiction in ordinary circumstances where the only aspect of an appeal is the Attorney General's discretion itself. Nevertheless, *Doherty* is not squarely applicable to the case at bar because Arar does not simply challenge the discretionary determinations of the Attorney General, but rather the legal authority of the Attorney General to send him to a country in violation of CAT.

Defendants further note that the Attorney General's discretion is even more expansive in cases involving the removal of aliens who pose dangers to national security. First, Congress established, through [*273] FARRA, that regulations implementing the United States' obligations under the CAT, *see* Pub. L. No. 105-277, § 2242(c), do not apply to aliens who may pose a danger to the security of the United States. *See 8 U.S.C. § 1231(b)(3)(B)*. Second, alien terrorists seeking protection under Article 3 of CAT are not entitled to standard administrative proceedings governing their requests for withholding of removal under the CAT. *See 8 C.F.R. § 208.18(d)*.

To the extent that Arar challenges the Attorney General's discretion in these areas, his claims would be foreclosed. *See Doherty, 808 F.2d at 942.* But, outside a challenge to the *merits* of the Attorney General's findings, the question is whether, in spite of CAT, the Attorney General had the authority to remove Arar, even if he were a member of al Queda, to a country where he was likely to face torture. *Section 1252(a)(2)(B)(ii)*, as interpreted under case law, will not erect a bar to that constitutional question, regardless of whether Arar can prevail on the merits of the issue.

"If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept" defendants' jurisdictional argument. *St. Cyr, 533 U.S. at 314, 121 S.Ct. at 2287.* "But the absence of such a forum," *id.*, coupled with the serious constitutional questions raised in this case, cautions against foreclosing what is apparently Arar's sole remaining avenue for legal challenge.

(iv) FARRA

Finally, defendants argue that any claim involving a violation of the CAT would be foreclosed due to plaintiff's failure to institute a review of a final order of removal under FARRA. Under FARRA, § 2242(d),

> Notwithstanding any other provision of law, and except as provided in the regula-

> tions described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section [this note] shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section [this note], or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (*8 U.S.C. 1252*).

Claiming that Counts 2 and 3, "at their core," assert violations of FARRA, defendants contend that the jurisdiction-limiting principles of FARRA bar federal question jurisdiction "to 'consider' that determination, whether in the guise of a *Bivens* action or otherwise." Ashcroft Mem. at 30.

As discussed *supra* at part (4) of this discussion section of the opinion, the policies enunciated under FARRA do not permit a private cause of action for damages for a violation of that provision. Nevertheless, the jurisdiction-limiting provision of FARRA, which channels review into one consolidated proceeding in the court of appeals, is of questionable relevance to claims (whatever their merit) raised under other statutes and the constitution in a case in which defendants by their actions essentially rendered

meaningful review an impossibility. This is the case even if, as defendants argue, Arar's complaint is nothing more than a second chance at challenging "the determination that his removal to Syria complied with the policy [in FARRA]." Ashcroft Mem. at 30.

To summarize the jurisdictional argument, IIRIRA was intended to create a "streamlined process," in which issues of law and fact in matters concerning the admission and exclusion of aliens "are not [*274] subject to separate rounds of litigation," *Van Dinh v. Reno, 197 F.3d 427, 433 (10th Cir. 1999)* - not to eliminate judicial review altogether. The jurisdiction-limiting and jurisdiction-stripping provisions of IIRIRA do not preclude a consideration of the merits of Arar's alleged due process violations.

b. **Substantive Due Process**[76]

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[76] Defendants also raise qualified immunity arguments with respect to Counts 2 and 3 as well as 4, and those arguments will be considered, as necessary, only after the underlying constitutional questions have been addressed. Although "many courts faced with claims resting on constitutional rights of uncertain scope have dismissed cases based on qualified immunity alone," *Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596, 601 (D.C. Cir. 2000), rev'd on other grounds sub nom., Christopher v. Harbury, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002)* (citing *Childress v. Small Bus. Admin., 825 F.2d 1550, 1552 (11th Cir. 1987)*), the Supreme Court has cast doubt on this approach. *See Wilson v. Layne, 526 U.S. 603, 609, 119 S.Ct. 1692, 1697, 143 L.Ed.2d 818 (1999)*. Accordingly, the merits of the constitutional argument will be considered before adjudication of the qualified-immunity issue.

Arar argues that the treatment he allegedly suffered unquestionably constitutes a violation of substantive due process. *See* Pl. Opp. Mem.at 27. However, defendants question whether robust *Fifth Amendment* protections can extend to someone like Arar, who, for juridical purposes, never actually entered the United States. Moreover, they cite precedent rejecting extraterritorial *Fifth Amendment* protections to non-U.S. citizens.

While one cannot ignore the "shocks the conscience" test established in *Rochin v. California, 342 U.S. 165, 172-73, 72 S.Ct. 205, 209-10, 96 L.Ed. 183 (1952)*, that case involved the question whether torture could be used to extract evidence for the purpose of prosecuting criminal conduct, a very different question from the one ultimately presented here, to wit, whether substantive due process would erect a *per se* bar to coercive investigations, including torture, for the purpose of preventing a terrorist attack. Whether the circumstances here ultimately cry out for immediate application of the Due Process clause, or, put differently, whether torture always violates the *Fifth Amendment* under established Supreme Court case law prohibiting government action that "shocks the conscience" - a question analytically prior to those taken up in the parties' briefing - remains unresolved from a doctrinal standpoint.[77] Neverthe-

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[77] In *Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)*, this circuit noted the "universal condemnation of torture in numerous international agreements[] and the renunciation of torture as an instrument of official policy by virtually all of the

less, because [*275] both parties seem (at least implicitly) to have answered this question in the affirmative, it will be presumed for present purposes

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nations of the world (in principle if not in practice)" and found that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations." *Id. at 880. Filartiga* cited, in a footnote, survey data (which the circuit court did not clearly endorse) indicating that torture might be prohibited under the *Eighth Amendment to the U.S. Constitution*, which bars "cruel and unusual punishments." *See id. at 884, n. 13.* But, this dictum does not address the constitutionality of torture to prevent a terrorist attack.

Although the United States has, in the context of various international undertakings, made certain treaty commitments against torture, these obligations, unlike the Due Process clause, can be repudiated. Notwithstanding the well established cannon that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. The Schooner Charming Betsy, 2 Cranch 64, 6 U.S. 64, 118, 2 L. Ed. 208 (1804)*, as well as the argument, pressed by some, that customary international law is always binding on all states, it is dubious whether that proposition would hold true in the face of congressional legislation to the contrary. As the Ninth Circuit has explained, "we are bound by a properly enacted statute, provided it be constitutional, even if that statute violates international law." *Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991). See United States v. Aguilar, 883 F.2d 662, 679 (9th Cir. 1989)* ("In enacting statutes, Congress is not bound by international law; if it chooses to do so, it may legislate contrary to the limits posed by international law."), *cert. denied, 498 U.S. 1046, 111 S. Ct. 751, 112 L. Ed. 2d 771 (1991). See also* Restatement (Third) of International Law § 115(1) (a) ("An Act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled.").

that the Due Process clause would apply to the facts alleged.

Defendants argue that Arar's claims alleging torture and unlawful detention in Syria are *per se* foreclosed under *Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950)*, and its progeny. These cases, they claim, unequivocally establish that non-resident aliens subjected to constitutional violations on non-U.S. soil are prohibited from bringing claims under the Due Process clause. *See, e.g.*, U.S. Mem. at 25; Thompson Mem. at 29, 31.

In *Eisentrager*, the Supreme Court held that a federal district court lacked jurisdiction to issue a writ of habeas corpus to twenty-one German nationals who had been captured in China by U.S. forces, brought to trial and convicted before an American military commission in Nanking and placed in incarceration in occupied Germany. The Supreme Court ruled that non-U.S. citizens with absolutely no relationship to the United States, captured outside U.S. territory and tried before a military tribunal, could not avail themselves of the right of habeas corpus to prove their innocence before a U.S. court. The Court held that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id. at 771, 70 S.Ct. at 940.* Bereft of any established contacts with the United States, the *Eisen-*

trager petitioners could not avail themselves of U.S. courts.

Under *Eisentrager*, given that "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection," *id. at 777-78, 70 S.Ct. at 943*, aliens outside the United States could not invoke the Constitution on their behalf. Consequently, the "nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy." *Id. at 776, 70 S.Ct. at 943.*

However, there are obvious distinctions between *Eisentrager* and the case at bar. The *Eisentrager* petitioners had a trial pursuant to the laws of war. Although that trial might not have afforded them the panoply of rights provided in the civilian context, one cannot say that the petitioners had no fair process. Moreover, the *Eisentrager* detainees had "never been or resided in the United States," were "captured outside of our territory and there held in military custody as [ ] prisoner[s] of war," were "tried by a Military Commission sitting outside the United States" and were "at all times imprisoned outside the United States." *Eisentrager, 339 U.S. at 777, 70 S.Ct. at 943.* Arar, by contrast, was held virtually incommunicado - moreover, on U.S. soil - and denied access to counsel and process of any kind. Owing to these

factual distinctions, *Eisentrager* is not squarely applicable to the case at bar.

Defendants also cite [*276] *United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990)*, in which the Supreme Court revisited the question of the extraterritoriality of the U.S. Constitution to non-U.S. citizens. *Verdugo-Urquidez* involved a question regarding the extraterritoriality of the *Fourth Amendment's* protection against unreasonable searches and seizures. The Court held that a warrantless search and seizure of an alien's property in Mexico, even though orchestrated within the United States, did not constitute a *Fourth Amendment* violation. Although the illegal search was ordered by U.S. officials, it took place "solely in Mexico," *Verdugo-Urquidez, 494 U.S. at 264, 110 S.Ct. at 1060*, which, the Court held, amounted to no *Fourth Amendment* violation.

After foreclosing the possibility of any extraterritorial application of the *Fourth Amendment*, the *Verdugo-Urquidez* court explored in dicta the same question with regard to the *Fifth Amendment*. Relying on dicta in *Eisentrager*, the Supreme Court held that prior case law foreclosed such possibility:

> Indeed, we have rejected the claim that aliens are entitled to *Fifth Amendment* rights outside the sovereign territory of the United States. In *Johnson v. Eisentrager* . . . the Court held that enemy

> aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the *Fifth Amendment* . . . . The *Eisentrager* opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry; "the alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society." But our rejection of the extraterritorial application of the *Fifth Amendment* was emphatic: "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. . . . None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it."

494 U.S. at 269, 110 S.Ct. at 1063 (quoting *Eisentrager, 339 U.S. at 770, 784-85, 70 S.Ct. at 940, 947).*

However, *Verdugo-Urquidez,* which involved a search and seizure of a home in Mexico, can be distinguished from the case at bar. As Justice Kennedy

observed in his concurring opinion, Mexico's different legal regime compounded (and perhaps created) the *Fourth Amendment* violations. "The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the *Fourth Amendment's* warrant requirement should not apply in Mexico as it does in this country." *Verdugo-Urquidez, 494 U.S. at 278, 110 S.Ct. at 1068* (Kennedy, J., concurring).

Verdugo-Urquidez is further distinguishable from the instant case by the fact that the defendant in that case was prosecuted in an Article III court, where "all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the *Due Process Clause of the Fifth Amendment* protect the defendant." *Id.* Thus, any anxiety over the lack of *Fourth Amendment* protection were minimized by the fact that the trial would ultimately proceed in accordance with *Fifth Amendment* guarantees.

[*277] After *Verdugo-Urquidez,* the Court of Appeals for the District of Columbia Circuit considered a case, more directly applicable to the facts at issue here, involving a Guatemalan citizen and high-ranking member of a Guatemalan rebel organization who was allegedly tortured in Guatemala at the behest of CIA officials, who had ordered and directed the torture and then engaged in an eighteen-month

cover-up. *Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596 (D.C. Cir. 2000), rev'd on other grounds sub nom., Christopher v. Harbury, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002).* The constitutional violations at issue in *Harbury* included torture. Moreover, the torture was allegedly planned and orchestrated by U.S. officials acting within the United States. Thus, unlike *Eisentrager* and *Verdugo-Urquidez,* the factual background of *Harbury* is closely related to the case at bar.

The D.C. Circuit relied heavily on dicta in *Verdugo-Urquidez,* particularly its reading of *Eisentrager,* to ultimately hold that the decedent's wife (a U.S. citizen) could not bring a *Fifth Amendment* claim on his behalf for the torture he suffered in Guatemala. The D.C. Circuit noted, first, that *Verdugo-Urquidez* did not attach constitutional significance to the fact "that the search was both planned and ordered from within the United States. Instead, it focused on the location of the primary constitutionally significant conduct at issue: the search and seizure itself." *Harbury, 233 F.3d at 603. See id.* ("The search was conceived, planned, and ordered in the United States, carried out in part by agents of the United States Drug Enforcement Agency, and conducted for the express purpose of obtaining evidence for use in a United States trial. . . . Still, the Court treated the alleged violation as having 'occurred solely in Mexico.'") (citing *Verdugo-Urquidez, 494 U.S. at 264, 110 S.Ct. at 1060*). Because of this, the D.C. Circuit found that "the primary constitu-

tionally relevant conduct at issue here - [the deceased's] torture - occurred outside the United States." *Id. at 603.*

The D.C. circuit further noted that *Verdugo-Urquidez* read *Eisentrager* to "emphatically" reject the notion of any extraterritorial application of the *Fifth Amendment.* That language, although "dicta . . . is firm and considered dicta that binds this court." *Harbury, 233 F.3d at 604* (citing *United States v. Oakar, 324 U.S. App. D.C. 104, 111 F.3d 146, 153 (D.C. Cir. 1997)).*[78]

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[78] The standard in the Second Circuit regarding the effect of dictum is slightly different. The Second Circuit held in *United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975)* that "a distinction should be drawn between 'obiter dictum,' which constitutes an aside or an unnecessary extension of comments, and considered or 'judicial dictum' . . . to guide the future conduct of inferior courts." Under this ruling, Supreme Court dictum is not binding on lower courts within this judicial circuit, but "must be given considerable weight and cannot be ignored in the resolution of the close question." *Id. at 206.* Such dictum, "while of great significance and entitled to this Court's respect does not preclude . . . this Court from reaching its own decision after independent consideration and study of the question." *Id. at 206, n. 4* (citation omitted).

Under the Second Circuit's approach, the Supreme Court's discussion of the extraterritoriality of the *Fifth Amendment*, for these purposes, appears to be "of the 'obiter dictum' variety. Even if it were 'judicial dictum,' it would still 'not be binding,' although 'it must be given considerable weight and can not be ignored in the resolution of [a] close question.'" *Velazquez v. Legal Services Corp., 349 F. Supp. 2d 566, 582 (E.D.N.Y. 2004)* (citing *Bell, 542 F.2d at 206*).

Still, the case at bar, unlike *Harbury*, presents a claim of torture by an alien apprehended at the U.S. border and held here pending removal; furthermore, the fact that Arar's alleged torture began with his removal from the territory of the United [*278] States makes this case factually different from *Harbury*. Nevertheless, by answering the question "whether the *Fifth Amendment* prohibits torture of non-resident foreign nationals living abroad" in the negative, *id. at 602*, *Harbury* appears to have important implications for the case at bar.

However, in *Rasul v. Bush, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004)*, the Supreme Court issued a ruling potentially favorable to Arar. *Rasul* considered the statutory habeas claims of two Australian and twelve Kuwaiti citizens captured abroad, who challenged the legality of their detention at the Guantanamo Bay Naval Base. The Supreme Court extended statutory habeas jurisdiction to the detainees, finding that they could challenge their detention in Guantanamo Bay, a territory over which "the United States . . . exercise[s] complete jurisdiction and control." *Id. at 471, 124 S.Ct. at 2691* (internal quotation marks omitted).

Rasul only considered the question "whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Id. at 485, 124 S.Ct. at 2699*. Moreover, the Supreme Court reached its decision by

noting that "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses." *Id. at 480, 124 S.Ct. at 2696.*

To be sure, there is no argument that the United States exercises the same control over the Syrian officials alleged to have detained and tortured Arar as it does in the case of Guantanamo Bay. Nevertheless, one might read *Rasul* as extending habeas jurisdiction to a group of aliens with even less of a connection to the United States than Arar.

Defendants reject that contention, arguing that, in light of the above-cited cases, the substantive due process violations asserted in Arar's complaint "are predicated upon a constitutional protection that has never been extended to arriving aliens, much less aliens whom the executive has determined pursuant to legislative authorization have terrorist connections." Ashcroft Mem. at 7. But Arar - who received none of the procedural and substantive protections afforded the petitioners in *Eisentrager* - *has* a connection to the United States lacking in *Eisentrager, Verdugo-Urquidez, Harbury* and *Rasul.* All of Arar's claims against U.S. officials allegedly arise out of actions taken or initiated by them while Arar was on U.S. soil. Moreover, the factual scenario presented in this case makes it more difficult to simply apply the precedents established in the *Eisentrager* line of cases.

As already noted, the *Eisentrager* detainees had "never been or resided in the United States," were "captured outside of our territory and there held in military custody as [] prisoner[s] of war, were 'tried by a Military Commission sitting outside the United States' and were "at all times imprisoned outside the United States." *Eisentrager, 70 S.Ct. at 934.* Arar, by contrast, was held virtually incommunicado in *this* country and denied access to counsel and a meaningful process of any kind. Moreover, as the *Rasul* court noted, the Guantanamo detainees "are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing. . . ." *Id. at 476, 124 S.Ct. at 2693. See also id. at 488, 124 S.Ct. at 2700* (Kennedy, J., concurring in judgment) ("having already been subject to procedures establishing their status, [*279] [the *Eisentrager* plaintiffs] could not justify 'a limited opening of our courts' to show that they were 'of friendly personal disposition' and not enemy aliens.") (citing *Eisentrager, 339 U.S. at 778*).

Another difference between *Rasul* and the case at bar is that *Rasul* based its jurisdiction on the statutory habeas provision (*28 U.S.C. § 2241*), not the U.S. Constitution.[79] Arar, by contrast, alleges

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[79] It should be noted that Arar's counsel (both present and former) never brought a petition for habeas corpus during his detention in the United States or while in Syria. Precisely what, if

substantive constitutional claims not addressed in *Rasul*. *See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 463 (D.D.C. 2005)* (citing language in *Rasul* as "standing in sharp contrast to the declaration in *Verdugo-Urquidez* . . . that the Supreme Court's 'rejection of extraterritorial application of the *Fifth Amendment* [has been] emphatic'") (citing *Verdugo-Urquidez, 494 U.S. at 269, 110 S.Ct. at 1063*), *appeal docketed*, No. 05-8003 (D.C. Cir. March 10, 2005); *Khalid v. Bush, 355 F. Supp. 2d 311, 321 (D.D.C. 2005)* ("In the final analysis, the lynchpin for extending constitutional protections beyond the citizenry to aliens was and remains 'the alien's presence within its territorial jurisdiction.'") (citing *Eisentrager, 339 U.S. at 771, 70 S.Ct. at 940*), *appeal docketed sub nom. Boumediene v. Bush et al.*, No. 05-5062 (D.C. Cir. March 10, 2005).

At this juncture, the question whether the *Due Process Clause* vests Arar with substantive rights is unresolved. Assuming, without resolving, the existence of some substantive protection, Arar's

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any, remedy might have been available to Arar via habeas is uncertain. Moreover, without the benefit of hindsight, Arar's former counsel may not have known to bring an emergency petition for stay of removal during Arar's 13-day U.S. detention, especially if counsel was not informed of any final order of removal. And once Arar had been removed from the United States, it is uncertain how a habeas petition would have fared. Because no habeas petition was ever sought, the question whether statutory habeas protection might have been available during the pendency of Arar's detention is, at this point, an academic question.

claims are foreclosed under an exception to the *Bivens* doctrine.

c. Special Factors Counseling Hesitation

The substantive due process analysis notwithstanding, the Supreme Court's creation of a *Bivens* remedy for alleged constitutional violations by federal officials is subject to certain prudential limitations and exceptions. The Supreme Court has "expressly cautioned . . . that such a remedy will not be available when 'special factors counseling hesitation' are present." *Chappell v. Wallace, 462 U.S. 296, 298, 103 S.Ct. 2362, 2365, 76 L.Ed.2d 586 (1983)* (quoting *Bivens, 403 U.S. at 396, 91 S.Ct. at 2005*). Those factors do not concern "the merits of the particular remedy [being] sought." *Bush v. Lucas, 462 U.S. 367, 380, 103 S.Ct. 2404, 2413, 76 L.Ed.2d 648 (1983).* Rather, they involve "the question of who should decide whether such a remedy should be provided." *Id.* For example, a *Bivens* remedy will not be extended to a plaintiff if "defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green, 446 U.S. 14, 18-19, 100 S.Ct. 1468, 1471, 64 L.Ed.2d 15 (1980).* Moreover, courts will refrain from extending a *Bivens* claim if doing so trammels upon matters best decided by coordinate branches of government. *See Lucas, 462 U.S. at 378-80, 103 S.Ct. at 2411-13* (discussing [*280] case law

according to which courts have deferred to coordinate branches).

Defendants argue that both of these exceptions apply to Counts 2 and 3 because, first, the INA provides Arar with an adequate, comprehensive remedy and, second, because the foreign policy and national-security concerns raised here are properly left to the political branches of government. The first argument is unpersuasive; the second is compelling.

(i) The Immigration and Nationality Act

First, defendants argue that the remedial scheme set forth in the INA obviates any need for a *Bivens* remedy. Having already pursued the argument that the INA bars federal jurisdiction over Arar's claims, they press this contradictory argument. Here, they claim that the INA provides Arar with a "comprehensive statutory scheme" to bring claims incident to his removal order, particularly via statutory provisions channeling review of the immigration-related issues to the federal courts of appeal. *See, e.g.*, Thompson Mem. at 26.

Defendants' invocation of the INA is no more persuasive in the *Bivens* context than it was in the jurisdictional context. In fact, to argue that the INA precludes federal jurisdiction and, at the same time, affords Arar a "comprehensive scheme" for review has a certain dissonance, even under the most liberal construction of alternative pleading. Arar alleges

that his final order of removal was issued moments before his removal to Syria, which suggests that it may have been unforeseeable or impossible to successfully seek a stay, preserving Arar's procedural rights under the INA. *See supra* at footnote 12 of this opinion. In any event, the INA would not provide any kind of "comprehensive scheme" with respect to his alleged torture by Syrian officials.

Defendants cite *Sugrue v. Derwinski, 26 F.3d 8 (2d Cir. 1994)*, and Van *Dinh v. Reno, 197 F.3d 427 (10th Cir. 1999)*, in support of their contention that the INA is an adequate alternative to *Bivens*. Neither case supports their position. *Sugrue* involved, *inter alia*, a claim against employees of the Veterans Administration based on a disputed disability rating and lost benefits. The court declined to infer a cause of action against the employees in their individual capacities, in light of the "multitiered and carefully crafted administrative process" for addressing disputed benefit ratings. *26 F.3d at 12*.

Van Dinh is equally inapposite. That case sought class-wide injunctive relief against the Attorney General's *discretionary* decision to detain aliens pending their removal. Unlike the case at bar, the jurisdiction-stripping provisions of the INA raised by defendants *did* apply. *See 197 F.3d at 432* (citing *8 U.S.C. § 1252(a)(2)(B)(ii)*). Moreover, the alien had a meaningful alternative remedy as he was entitled to individual relief by appealing his order of deportation to the Board of Immigration Appeals, which he

bypassed by filing a habeas corpus action in federal district court instead. *Id. at 429.*

Defendants note, however, that Congress has deliberately refused to provide a private cause of action for monetary damages within any provision of the INA. This is perhaps their strongest argument that Congress did not intend to allow a private party to pursue a judicial solution to an administrative problem. Nevertheless, the INA deals overwhelmingly with the admission, exclusion and removal of aliens - almost all of whom seek to remain within this country until their claims are fairly resolved. That framework does not automatically lead to an adequate and meaningful remedy for the conduct alleged here.

[*281] In short, defendants have failed to demonstrate that "Congress has provided an alternative remedy [in the form of the INA]," *Carlson, 446 U.S. at 18-19*, or to identify an alternative venue through which Arar could have satisfactorily preserved "some avenue for judicial relief." *Calcano-Martinez v. INS, 232 F.3d 328, 333 (2d Cir. 2000).*

(ii) National-Security and Foreign Policy Considerations

Defendants next argue that this court should decline to extend a *Bivens* remedy in light of the national-security concerns and foreign policy decisions at the heart of this case. Such determinations,

they claim, are uniquely reserved to the political branches of government and counsel against the extension of a damages remedy here. *See, e.g.*, Ashcroft Mem. at 33, n.32.

This case undoubtedly presents broad questions touching on the role of the Executive branch in combating terrorist forces - namely the prevention of future terrorist attacks within U.S. borders by capturing or containing members of those groups who seek to inflict damage on this country and its people. Success in these efforts requires coordination between law-enforcement and foreign-policy officials; complex relationships with foreign governments are also involved. In light of these factors, courts must proceed cautiously in reviewing constitutional and statutory claims in that arena, especially where they raise policy-making issues that are the prerogative of coordinate branches of government.

A number of considerations must be noted here. First, Article I, Section 8 of the U.S. Constitution places the regulation of aliens squarely within the authority of the Legislative branch. Congress has yet to take any affirmative position on federal-court review of renditions; indeed, by withholding any explicit grant of a private cause of action under the Torture Victim Protection Act to plaintiffs like Arar, or to any plaintiff under FARRA, the opposite is the more reasonable inference.

Second, this case raises crucial national-security and foreign policy considerations, implicating "the complicated multilateral negotiations concerning efforts to halt international terrorism." *Doherty v. Meese, 808 F.2d 938, 943 (2d Cir. 1986).* The propriety of these considerations, including supposed agreements between the United States and foreign governments regarding intelligence-gathering in the context of the efforts to combat terrorism, are most appropriately reserved to the Executive and Legislative branches of government. Moreover, the need for much secrecy can hardly be doubted. One need not have much imagination to contemplate the negative effect on our relations with Canada if discovery were to proceed in this case and were it to turn out that certain high Canadian officials had, despite public denials, acquiesced in Arar's removal to Syria. More generally, governments that do not wish to acknowledge publicly that they are assisting us would certainly hesitate to do so if our judicial discovery process could compromise them. Even a ruling sustaining state-secret-based objections to a request for interrogatories, discovery demand or questioning of a witness could be compromising. Depending on the context it could be construed as the equivalent of a public admission that the alleged conduct had occurred in the manner claimed - to the detriment of our relations with foreign countries, whether friendly or not. Hence, extending a *Bivens* remedy "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *United States v. Verdugo-Urquidez,*

494 U.S. 259, 273-74, 110 S. Ct. 1056, 1065, 108 L. Ed. 2d 222 (1990). It risks "producing what the Supreme Court has called in another context [*282] 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202, 208 (D.C. Cir. 1985)* (Scalia, J.) (quoting *Baker v. Carr, 369 U.S. 186, 226, 217, 82 S.Ct. 691, 715, 710, 7 L.Ed.2d 663 (1962)).* As the Supreme Court recently noted, "removal decisions, including the selection of a removed alien's destination, 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" *Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348, 125 S. Ct. 694, 704, 160 L. Ed. 2d 708 (2005)* (quoting *Mathews v. Diaz, 426 U.S. 67, 81, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)). See also Shaughnessy v. United States, 345 U.S. 206, 222, 73 S. Ct. 625, 634, 97 L. Ed. 956 (1953)* (Jackson, J., dissenting) ("Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion.").

The Supreme Court has further noted that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interfer-

ence." *Harisiades v. Shaughnessy, 342 U.S. 580, 588-89, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952)* (footnote omitted); *see also Bertrand v. Sava, 684 F.2d 204, 211-12 (2d Cir. 1982).*

Third, with respect to these coordinate branch concerns, there is a fundamental difference between courts evaluating the legitimacy of actions taken by federal officials in the domestic arena and evaluating the same conduct when taken in the international realm. In the former situation, as in *Elmaghraby v. Ashcroft, 2005 U.S. Dist. LEXIS 21434, No. 04-cv-1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005),* judges have not only the authority vested under the Constitution to evaluate the decision-making of government officials that goes on in the domestic context, whether it be a civil or a criminal matter, but also the experience derived from living in a free and democratic society, which permits them to make sound judgments. In the international realm, however, most, if not all, judges have neither the experience nor the background to adequately and competently define and adjudge the rights of an individual vis-a-vis the needs of officials acting to defend the sovereign interests of the United States, especially in circumstances involving countries that do not accept our nation's values or may be assisting those out to destroy us.

On a related point, despite plaintiff's counsel's contention to the contrary at oral argument, the qualified immunity defense, which works effectively

in the domestic sphere to protect officials in the performance of their duties, is not a sufficient protection for officials operating in the national-security and foreign policy contexts. This is because the ability to define the line between appropriate and inappropriate conduct, in those areas, is not, as stated earlier, one in which judges possess any special competence. Moreover, it is an area in which the law has not been developed or specifically spelled out in legislation. Nor can we ignore the fact that an erroneous decision can have adverse consequences in the foreign realm not likely to occur in the domestic context. For example, a judge who, because of his or her experience living in the community, rejects a police claim that a certain demonstration is potentially violent and, as a result, allows the demonstration to proceed over the objections of these law-enforcement officials faces a much smaller risk that this decision will result in serious consequences even if, with the benefit of hindsight, his or [*283] her judgment turns out to be wrong. On the other hand, a judge who declares on his or her own Article III authority that the policy of extraordinary rendition is under all circumstances unconstitutional must acknowledge that such a ruling can have the most serious of consequences to our foreign relations or national security or both.

Accordingly, the task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches, in whom the Constitution imposes responsibility for our for-

eign affairs and national security. Those branches have the responsibility to determine whether judicial oversight is appropriate. Without explicit legislation, judges should be hesitant to fill an arena that, until now, has been left untouched -- perhaps deliberately -- by the Legislative and Executive branches. To do otherwise would threaten "our customary policy of deference to the President in matters of foreign affairs." *Jama, 543 U.S. at 348, 125 S.Ct. at 704. See Chaser Shipping Corp. v. U.S., 649 F. Supp. 736, 739 (S.D.N.Y. 1986), aff'd, 819 F.2d 1129 (2d Cir. 1987)* (affirming dismissal by district court of tort claims by foreign shipping company against United States under covert military operations in Nicaragua), *cert. denied, 484 U.S. 1004, 108 S. Ct. 695, 98 L. Ed. 2d 647 (1988), rehrg. denied, 487 U.S. 1243, 108 S. Ct. 2921, 101 L. Ed. 2d 952 (1988).* In sum, whether the policy be seeking to undermine or overthrow foreign governments, or rendition, judges should not, in the absence of explicit direction by Congress, hold officials who carry out such policies liable for damages even if such conduct violates our treaty obligations or customary international law.

For these reasons, I conclude that a remedy under *Bivens* for Arar's alleged rendition to Syria is foreclosed.[80] Accordingly, Counts 2 and 3 of the complaint are dismissed.[81]

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[80] Under the Authorization for Use of Military Force, Pub.L. 107-40, §§ 1-2, 115 Stat. 224 (Sept. 18, 2001) ("AUMF"), President Bush has been authorized to "use all necessary and appropriate force against those nations, organizations, or per-

(5)

Detention Within the United States

Count 4 of Arar's complaint challenges his thirteen-day period of detention within the United States, during which time he alleges he was denied access to counsel and subjected to coercive and involuntary custodial interrogation. This included being placed in a cell at JFK Airport with lights remaining on all night, the denial of telephone privileges and adequate food, denial of access to his consulate and verbal attacks by interrogators. Arar's complaint further alleges that he was involuntarily subjected to coercive interrogation "for excessively long periods of time and at odd hours of the day and night" and was "placed in solitary confinement, shackled, [*284]

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sons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Despite the breadth of this language, the AUMF is not a factor in the above analysis.

[81] Two of the individually named defendants, Larry Thompson and John Ashcroft, also raise a defense under the political-question doctrine. Under that doctrine, courts will not review "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Asso. v. American Cetacean Soc., 478 U.S. 221, 230, 106 S. Ct. 2860, 2866, 92 L. Ed. 2d 166 (1986).* Having determined that no *Bivens* remedy is available here, there is no need to discuss the political-question doctrine.

chained, strip-searched and deprived of sleep and food for extended periods of time." Cplt. P4. The interrogation was "designed to overcome his will and compel incriminating statements from him." Cplt. P4.

An individual in Arar's shoes, detained at the U.S. border and held pending removal, does not officially effect an "entry into the United States." *Zadvydas v. Davis, 533 U.S. 678, 693, 121 S.Ct. 2491, 2500, 150 L.Ed.2d. 653 (2001).* Instead, such a person is "'treated,' for constitutional purposes, 'as if stopped at the border.'" *Id.* (citing *Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215, 73 S.Ct. 625, 629-31, 97 L.Ed. 956 (1953)). See Leng May Ma v. Barber, 357 U.S. 185, 188-90, 78 S.Ct. 1072, 1074-75, 2 L.Ed.2d 1246 (1958)* (alien "paroled" into the United States pending admissibility had not effected an "entry"); *Kaplan v. Tod, 267 U.S. 228, 230, 45 S.Ct. 257, 257-58, 69 L.Ed. 585 (1925)* (despite nine years' presence in the United States, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States").

Defendants liken Arar's juridical status to that of the plaintiff in *Mezei. Mezei* concerned a lawful permanent resident who briefly left the country and, upon return, was refused entry for national security reasons and held on Ellis Island indefinitely while the Government attempted to find another country to accept him. Upon challenging his nearly

two-year detention on due process grounds, the Supreme Court held that the plaintiff enjoyed few, if any, procedural due process rights to challenge his incarceration. With *Mezei* as the starting point, defendants argue that Arar, too, is owed little or no due process protections. *See, e.g.*, Mueller Mem. at 27 (citing *Zadvydas* for proposition that "Arar['s] entitlement to constitutional protection is at best debatable").

But the precise relationship between *Mezei* and this case is unclear. For one thing, *Mezei* does not address the *substantive* due process claims raised here. Moreover, the plaintiff in *Mezei* was attempting to effect an entry (or, more precisely, reentry) into the United States, which potentially raises different national security questions from an individual like Arar, who was only "passing through the United States" on his way to Canada. Thompson Mem. at 15.

With this questionable starting point, defendants launch into an argument regarding the substantive due process rights of excludable aliens, a matter about which courts have said relatively little. The Second Circuit, citing *Mezei*, has mentioned, in a footnote, that "other than protection against gross physical abuse, the alien seeking initial entry appears to have little or no constitutional due process protection." *Correa v. Thornburgh, 901 F.2d 1166, 1171, n.5 (2d Cir. 1990)*. Defendants cite *Correa* and *Mezei* as standing for the proposition that an individual in Arar's situation enjoys only the most lim-

ited due process protections while in the United States.

Assuming, *arguendo*, the aptness of *Correa* and *Mezei*, Arar's rights in the U.S. are by no means nonexistent. Although the federal courts have not fully fleshed out the contours an excludable alien's due process rights, certain developments since *Mezei* warrant mention.

Preliminarily, the First Circuit has noted that "outside the context of admission and exclusion procedures, excludable aliens do have due process rights." *Amanullah v. Nelson, 811 F.2d 1, 9 (1st Cir. 1987)*. *Amanullah* involved a habeas petition by four Afghani men challenging their detention pending final resolution of their exclusion proceedings. The First Circuit, affirming a lower court denial of the habeas [*285] petitions, noted the various constitutional guarantees afforded excludable aliens. The court noted that excludable aliens "have *personal* constitutional protections against illegal government action of various kinds; the mere fact that one is an excludable alien would not permit a police officer savagely to beat him, or a court to impose a standardless death penalty as punishment for having committed a criminal offense." *Id. at 9* (emphasis in original).

The Fifth Circuit has equally rejected the notion that "excludable aliens possess no constitutional rights." *Lynch v. Cannatella, 810 F.2d 1363, 1372,*

1374 (5th Cir. 1987). Lynch, like *Amanullah,* addressed the question whether excludable aliens - here, stowaways discovered hiding aboard a barge bound for ports on the Mississippi river - could challenge their incarceration pending removal. Noting that the stowaways did "not possess a due process right to remain free of incarceration pending their deportation," *id. at 1370,* the Fifth Circuit, nevertheless, noted that excludable aliens were, at a minimum, "entitled under the *due process clauses of the fifth* and *fourteenth amendments* to be free of gross physical abuse at the hands of state or federal officials." *Id. at 1374.* The Eleventh Circuit has reached a similar conclusion as well. *See Jean v. Nelson, 727 F.2d 957, 972 (11th Cir. 1984)* (en banc) ("Of course, there are certain circumstances under which even excludable aliens are accorded rights under the Constitution."), *aff'd, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985).* More recently, my colleague has flatly rejected the proposition that continued presence of national security concerns make the treatment of aliens in our custody within the United States unreviewable under *Bivens. Elmaghraby v. Ashcroft, 2005 U.S. Dist. LEXIS 21434, No. 04-cv-1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005)* (Gleeson, J.).

As already noted, *Correa* and *Mezei* are of questionable relevance to the case at bar because Arar was not attempting to effect entry to the United States. Regardless, the deprivations Arar alleges with respect to his treatment while in U.S. custody

potentially concern the type of "gross physical abuse" that could trigger a due process violation. Arar's allegations indicate that he was treated quite differently than the usual illegal alien. Although plaintiff's allegations - as compared to those in *Elmaghraby* -- are presently borderline as to whether they constitute a due process violation of "gross physical abuse," an amended complaint might remedy this deficiency.

Arar also alleges that defendants interfered with his access to courts in part by lying to his counsel. In order to successfully bring a denial-of-access claim, Arar must identify "a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury, 536 U.S. 403, 414-15, 122 S.Ct. 2179, 2186, 153 L.Ed.2d 413 (2002).* This requirement pays tribute to the fact that one's access to court is "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Id. at 415, 122 S.Ct. at 2186-87.*

Those defendants taking up the denial-of-access issue argue that the only interference with Arar's access to court involved his ability to file "'a petition for habeas corpus or . . . otherwise challenge his detention.'" Ashcroft Reply Br. at 23 (citing Pl. Opp. at 32). Because they believe that any habeas petition would have been "doomed to fail," *id.* at 24, Arar's denial-of-access claim must fail, too. Whether any such petition would have been successful, *see supra* at footnote 12 of this opinion, it is clear that

Arar is not asserting any challenge to his removal as [*286] such. Thus, any denial-of-access claim must concern more than his removal.

In any event, I have concluded that, given the serious national-security and foreign policy issues at stake, *Bivens* did not extend a remedy to Arar for his deportation to Syria and any torture that occurred there. It would, therefore, be circular to conclude that a denial of access to counsel amounted to a violation of the *Fifth Amendment* when Arar cannot assert a "separate and distinct right to seek judicial relief' against defendants in the first place. Thus, I am inclined to deny any such claim unless plaintiff in repleading Count 4 can articulate more precisely the judicial relief he was denied.

In sum, Count 4, construed most favorably to plaintiff, alleges a possible "gross physical abuse" due process violation and perhaps a limited denial of access to counsel right (apart from the rendition aspect of the claim).[82]

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[82] In a footnote of his opposition brief, *see* Pl. Mem. at 27, n.9, plaintiff raises a claim under the "state-created danger doctrine," according to which defendants violated the Due Process clause by affirmatively placing Arar in a situation where he was likely to face torture. At oral argument, counsel for Arar pressed this claim, arguing that it applies to Counts 2, 3 and 4. The state-created danger doctrine is but a back-door approach for reaching the claims in Counts 2 and 3 and is, therefore, rejected.

(6)

Qualified Immunity

Having dismissed Counts 2 and 3 of the complaint under the special factors precluding *Bivens* relief, the only remaining question is whether Count 4, if still viable, is subject to a defense under the qualified immunity doctrine. Defendants argue that none of the claimed violations raised in Arar's complaint could have been deemed clearly established under law at the time the events took place.

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).* Excluding the rendition aspect of the claim, the alleged "gross physical abuse" in the United States in Count 4 involved deprivations that would appear to violate clearly established rights. Such treatment, if true, may well violate the basic standards for a detainee in *any* context - civil, criminal, immigration, or otherwise - and possibly constitute conduct that a defendant could reasonably foresee giving rise to liability for damages. *See Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).*

(7)

Personal Involvement and Personal Jurisdiction

Defendants note, however, that the complaint lacks the requisite amount of personal involvement needed to bring a claim against them in their individual capacities or even to establish personal jurisdiction. *See, e.g.*, Ashcroft Mem. at 8. Indeed, at this point, the allegations against the individually named defendants do not adequately detail which defendants directed, ordered and/or supervised the alleged violations of Arar's due process rights, as defined in section (5) of this opinion, or whether any of the defendants were otherwise aware, but failed to take action, while Arar was in U.S. custody. *See Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995).* Accordingly, all claims against the individual defendants are dismissed without prejudice with leave for plaintiff to replead Count 4.

[*287] **(8)**

State-Secrets Privilege

The United States, invoking the state-secrets privilege, has moved for summary judgment under *Fed. R. Civ. P. 56*, with respect to Counts 1, 2 and 3 of the complaint. *See* Memorandum in Support of the United States' Assertion of State Secrets Privilege. The government has submitted declarations from

former Deputy Attorney General James B. Comey and former Secretary of the U.S. Department of Homeland Security Tom Ridge, attesting that foreign affairs considerations are involved in this case. *See* Dkt. No. 91. Certain defendants, noting the invocation of that privilege, argue that it constitutes yet a further reason warranting dismissal of any *Bivens* claim. *See, e.g.*, Mueller Reply Mem. at 6.

I determined that before addressing the state-secrets privilege, it would be more appropriate to resolve the motions to dismiss the statutory and constitutional claims because it was not clear how the confidentiality of such information could be maintained without prejudicing my ability to hear and fairly respond to plaintiff's arguments. Now that those Counts have been dismissed on other grounds, the issue involving state secrets is moot.

The United States does not seek to dismiss Count 4 on grounds of state-secrets privilege. The individual defendants, however, have asserted that all counts - including 4 - must be dismissed against them in light of the invocation of privilege by the United States. Because, as this court construes Count 4, the issue of state secrets is of little or no relevance, the individually named defendants' assertion that Count 4 must be dismissed with respect to them in light of the privilege is denied at this time. Should an amended complaint alter that picture, the issue can be addressed at that time.

Conclusion

1. Arar lacks standing to bring a claim for declaratory relief against plaintiffs in their official capacities, and thus those claims are denied.

2. With respect to claims under the Torture Victim Protection Act against defendants in their personal capacities, plaintiff as a non-citizen is unable to demonstrate that he has a viable cause of action under that statute or that defendants were acting under "color of law, of any foreign nation." Accordingly, Count 1 is dismissed with prejudice.

3. With respect to claims alleging that defendants violated Arar's rights to substantive due process by removing him to Syria and subjecting him to torture, coercive interrogation and detention in Syria, the INA does not foreclose jurisdiction over plaintiff's claims. Nonetheless, no cause of action under *Bivens* can be extended given the national-security and foreign policy considerations at stake. Accordingly, Counts 2 and 3 are dismissed with prejudice.

4. With respect the claim that Arar was deprived of due process or other constitutional rights by the defendants during his period of domestic detention, prior cases holding that inadmissible aliens deserve little due process protection are inapplicable because Arar was not attempting to effect an entry into the United States; in any event, the circumstances and conditions of confinement to which Arar

was subjected while in U.S. custody may potentially raise *Bivens* claims. However, plaintiff must replead those claims without regard to any rendition claim and name those defendants that were personally involved in the alleged unconstitutional treatment; as to the denial of access to counsel claim, he must also identify the specific injury he was prevented from [*288] grieving. Count 4 is therefore, dismissed without prejudice.

5. Claims against all ten John Doe law enforcement agents named in connection with that Count 4 are dismissed without prejudice as well, with leave to replead.

Dated: Brooklyn, New York
February 16, 2006

ORDERED:
[signature]
David G. Trager
United States District Judge

APPENDIX D - UNDATED

TORTURE VICTIM PROTECTION ACT OF 1991

PUBLIC LAW 102-256 [H.R. 2092]

28 USC 1350

102 P.L. 256; 106 Stat. 73; 1992 Enacted H.R. 2092;
102 Enacted H.R. 2092

An Act

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1, SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation --

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3, DEFINITIONS.

(a) Extrajudicial Killing. For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as in-

dispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture. For the purposes of this Act –

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

APPENDIX E -- UNDATED

Foreign Affairs Reform and Restructuring Act of 1998

8 USCS § 1231

TITLE 8. ALIENS AND NATIONALITY

CHAPTER 12. IMMIGRATION AND NATIONALITY
IMMIGRATION INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

*** CURRENT THROUGH PL 111-125, APPROVED 12/28/2009 ***

United States policy with respect to the involuntary return of persons in danger of subjection to torture. Act Oct. 21, 1998, P.L. 105-277, Div G, Subdiv B, Title XXII, Ch 3, Subch B, § 2242, 112 Stat. 2681-822, provides:

"**(a) Policy.** It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

"(b) **Regulations.** Not later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

"(c) **Exclusion of certain aliens.** To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations described in subsection (b) shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)).

"(d) **Review and construction.** Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the

review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

"**(e) Authority to detain.** Nothing in this section shall be construed as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act [8 USCS §§ 1101 et seq. generally; for full classification, consult USCS Tables volumes].

"**(f) Definitions.**

(1) Convention defined. In this section, the term 'Convention' means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984.

"(2) Same terms as in the Convention. Except as otherwise provided, the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.".

APPENDIX F – UNDATED

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984
entry into force 26 June 1987, in accordance with article 27 (1)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of

which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

Part I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted

by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application...

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights

...

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

...

APPENDIX G (Complaint with Exhibits)

CENTER FOR CONSTITUTIONAL RIGHTS
Barbara Olshansky
Michael Ratner
Jules Lobel
Robert Perry
Jeffrey Fogel
David Cole
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6439

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

04-CV- 0249

COMPLAINT AND DEMAND FOR JURY TRIAL

----------x

MAHER ARAR, :

Plaintiff, :

v. :

JOHN ASHCROFT, Attorney General of the United States; LARRY D. THOMPSON, formerly Acting Deputy Attorney General; TOM RIDGE, Secretary of State for Homeland Security; JAMES W. ZIGLAR, :

Formerly Commissioner for Immigration and Naturalization Services; J. SCOTT BLACKMAN, formerly Regional Director of the Eastern Regional Office of the Immigration and Naturalization Services; PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement; EDWARD J. McELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now District Director of Immigration and Customs Enforcement; ROBERT MUELLER, Director of the Federal Bureau of Investigation; and JOHN DOES 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents,

Defendants.

Plaintiff MAHER ARAR, by and through his attorneys allege the following:

NATURE OF ACTION

1. This is a constitutional, civil, and human rights case challenging the decision by United States government ("Federal") officials to send Maher Arar, a Canadian citizen seized while he was transiting through JFK Airport to a connecting flight home, to Syria for interrogation under torture. After holding Mr. Arar in harsh and punitive conditions, coercively interrogating him for hours on end, and depriving

him of contact with his family, his consulate, and his lawyer, federal officials rushed Mr. Arar off in a private jet to Jordan and then Syria. Federal officials removed Mr. Arar to Syria with the full knowledge of the existence of state-sponsored torture in that country, and in direct contravention of the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), a treaty ratified by the United States in 1994. Upon information and belief, federal officials removed Mr. Arar to Syria under the Government's "extraordinary renditions" program precisely because Syria could use methods of interrogation to obtain information from Mr. Arar that would not be legally or morally acceptable in this country or in other democracies.

2. On information and belief, the decision to remove Mr. Arar to Syria for interrogation under torture was based solely on Mr. Arar's casual acquaintance with individuals thought possibly to be involved in terrorist activity. On information and belief, there was never, and is not now, any reasonable suspicion to believe that Mr. Arar was involved in such activity.

3. Plaintiff Maher Arar brings this action against Defendants John Ashcroft, Larry D. Thompson, J. Scott Blackman, Edward J. McElroy, Robert Mueller, and others, for their role in the violation of his constitutional, civil and international human

rights. Defendants conspired with officials in the Syrian government and/or aided and abetted Syrian government officials in their plan to arbitrarily detain, interrogate and torture Mr. Arar. Defendants intentionally detained Mr. Arar and then removed him to Syria so that Syrian authorities could interrogate him under torture. Further or in the alternative, Defendants knew or ought reasonably to have known that by removing Mr. Arar to Syria there was a substantial likelihood that he would be subjected to torture. Defendants' conduct violates the Torture Victim Protection Act, the Fifth Amendment to the United States Constitution, and treaty law.

4. Prior to his removal, Defendants John Ashcroft, Larry D. Thompson, J. Scott Blackman, Edward J. McElroy, Robert Mueller, and others, unlawfully detained and interrogated Mr. Arar for thirteen days. During this time, Defendants denied Mr. Arar effective access to consular assistance, the courts, his lawyer, and family members. While confined, Defendants also subjected Mr. Arar to coercive and involuntary interrogation designed to overcome his will and compel incriminating statements from him. These interrogations were conducted for excessively long periods of time and at odd hours of the day and night. While in detention, Mr. Arar was subjected to unreasonable and excessively harsh conditions. He was held in solitary confinement, chained and shackled, subjected to invasive strip-searches, and deprived of sleep and food for extended periods

of time. By their actions Defendants Ashcroft, Thompson, Blackman, McElroy, Mueller, and others, violated rights guaranteed to Mr. Arar under the Fifth Amendment to the United States Constitution and treaty law.

5. Mr. Arar seeks a judgment declaring that Defendants' actions, and those of all persons acting on their behalf including their agents and/or employees are illegal and violate Mr. Arar's constitutional, civil, and human rights. Mr. Arar also seeks a declaration that his detention in the United States and the decision to remove him to Jordan and Syria were unjustified, unconstitutional, unlawful and without probable cause to believe that he was a member of or had any involvement with Al Qaeda or any other terrorist organization.

6. Mr. Arar also seeks compensatory and punitive damages for violations of his constitutionally and internationally protected rights.

JURISDICTION AND VENUE

7. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1350, note (the Torture Victim Protection Act), 5 U.S.C. §§ 551, 559 (Administrative Procedure Act), and 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act).

8. This action is brought pursuant to the Torture Victim Protection Act. It is also an action brought directly under the Fifth Amendment to the United States Constitution and treaty law.

9. Venue is proper in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b) in that a substantial part of the events giving rise to Mr. Arar's claims occurred in this District.

JURY DEMAND

10. Mr. Arar demands trial by jury in this action on each and every one of his claims.

PARTIES

11. Plaintiff MAHER ARAR is a 33 year old citizen of Canada. He currently resides in Ottawa, Canada. He and his parents came to Canada from Syria when he was seventeen years old. Mr. Arar obtained his Bachelors degree from McGill University, Montreal and his Masters degree in telecommunications from INRS-Telecommunications. Mr. Arar met his wife, Monia Mazigh, a Canadian citizen born in Tunisia, at McGill University, and they were married in 1994. They have two young children.

12. Since 1999, Mr. Arar has been employed by or worked on a consultancy basis with Math-

Works, a high-tech firm based in Massachusetts with clients all over the world, including the United States. Mr. Arar has substantial connections with the United States. At all material times, he had federal authorization to work in the United States. Mr. Arar lived in Boston when he was an employee of Mathworks. Mr. Arar has relatives and friends who live in the United States. Mr. Arar wishes to return to the United States for work and to visit relatives and friends but is prevented from doing so by the immigration order prohibiting his return.

13. Prior to the incidents complained of herein, Mr. Arar had never experienced any difficulties with either United States or Canadian authorities and had never been arrested. Mr. Arar is neither a member of nor involved with Al Qaeda or any other terrorist organization. Mr. Arar has never knowingly associated himself with terrorists, terrorist organizations or terrorist activity.

14. Defendant JOHN ASHCROFT is the Attorney General of the United States. In this capacity, Defendant Ashcroft, at the time of the actions complained of herein, had ultimate responsibility for the implementation and enforcement of United States immigration laws. Defendant Ashcroft was responsible for making the decision to remove Mr. Arar to Jordan and Syria. Conspiring with and/or aiding and abetting Defendants Thompson, Blackman, McElroy, Mueller, and others, as well as with Syrian

government officials, Defendant Ashcroft removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant Ashcroft removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant Ashcroft is sued in his official and individual capacities.

15. Defendant LARRY D. THOMPSON was Acting Attorney General when the unlawful actions complained of herein took place. In this capacity, Defendant Thompson signed the order removing Mr. Arar to Syria. Conspiring with and/or aiding and abetting Defendants Ashcroft, Blackman, McElroy, Mueller, and others, as well as Syrian government officials, Defendant Thompson removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant Thompson removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant Thompson is sued in his individual capacity.

16. Defendant TOM RIDGE is the Secretary of State for Homeland Security. In this capacity, Defendant Ridge is currently responsible for the implementation and enforcement of United States im-

migration laws. Defendant Ridge is sued in his official capacity.

17. Defendant JAMES W. ZIGLAR was the Commissioner of the Immigration and Naturalization Services at the time the unlawful actions complained of herein took place. At all material times, Defendant Ziglar had responsibility for the implementation and enforcement of United States immigration laws. He was the INS's chief executive officer. Conspiring with and/or aiding and abetting Defendants Ashcroft, Thompson, Blackman, McElroy, Mueller, and others, as well as Syrian government officials, Defendant Ziglar removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant Ziglar removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant Ziglar failed to consider the provisions of Article 3 of CAT, as required by 8 C.R.F. §235.8(b)(4), in making the decision to remove Mr. Arar to Syria. Defendant Ziglar is sued in his individual capacity.

18. Defendant J. SCOTT BLACKMAN was Regional Director of the Immigration and Naturalization Services for the Eastern District when the unlawful actions complained of herein took place. In this capacity, Defendant was responsible for ensur-

ing that proper consideration was given to Article 3 of CAT as required by 8 C.R.F. §235.8(b)(4). Conspiring with and/or aiding and abetting Defendants Ashcroft, Thompson, McElroy, Mueller, and others, as well as Syrian government officials, Defendant Blackman removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant Blackman removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant Blackman failed to properly consider the provisions of Article 3 of CAT as required by INA regulations in making the decision to remove Mr. Arar to Syria. Defendant Blackman is being sued in his individual capacity.

19. Defendant PAULA CORRIGAN is currently Regional Director of U.S. Immigration and Customs Enforcement for the Eastern Region. In this capacity, Defendant Corrigan is responsible for ensuring that proper consideration is given to Article 3 of CAT as required by 8 C.R.F. §235.8(b)(4) in deciding whether to remove persons from the United States. Defendant Corrigan is being sued in her official capacity.

20. Defendant EDWARD J. McELROY was formerly District Director for the Immigration and Naturalization Services for the New York City District and is presently District Director of U.S. Immi-

gration and Customs Enforcement. In these capacities, Defendant McElroy was, and is responsible for the enforcement of customs and immigration laws in the New York City area. Conspiring with and/or aiding and abetting Defendants Ashcroft, Blackman, Mueller, and others, as well as Syrian government officials, Defendant McElroy removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant McElroy removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant McElroy is sued in his individual capacity.

21. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation. In this capacity, Defendant Mueller is responsible for law enforcement operations in the United States, including counter-terrorism operations. Conspiring with and/or aiding and abetting Defendants Ashcroft, Thompson, Blackman, McElroy, and others, as well as Syrian government officials, Defendant Mueller removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, or in the alternative, Defendant Mueller removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there. Defendant Mueller is sued in his individual and official capacities.

22. Defendants JOHN DOE 1-10 are federal law enforcement agents who are employed by the FBI or the INS. Singly or collectively, the Doe Defendants have subjected Mr. Arar to coercive and involuntary custodial interrogation and unreasonably harsh and punitive conditions of detention. The Doe Defendants are being sued in their individual capacities.

STATEMENT OF FACTS

Background

23. The United States Department of State ("State Department") has long regarded Syria as a systematic practitioner of torture. The State Department lists Syria as a state sponsor of terrorism, and, for at least the past ten years, State Department Human Rights Country Reports on Syria have documented that the Syrian government practices torture. The most recent State Department report on Syria issued in March 2003, found, for example, that:

> there was credible evidence that security forces continued to use torture, although to a lesser extent than in previous years. Former prisoners, detainees, and the London-based Syrian Human Rights Organization reported that torture methods included administering electrical shocks; pulling out fingernails; forcing objects

> into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine. . . . Although it occurs in prison, torture was most likely to occur while detainees were being held at one of the many detention centers run by the various security services throughout the country, especially while the authorities were attempting to extract a confession or information.

U.S. Dept. of State, Bureau Of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2002: Syria* § 1c (Mar. 31, 2003) (Exhibit A attached to this complaint). More recently, President Bush publicly condemned Syria dictators for "a legacy of torture, oppression, misery and ruin." *Remarks by the President at the 20th Anniversary of the National Endowment for Democracy*, United States Chamber of Commerce, Washington D.C., November 6, 2003 (Exhibit B attached to this complaint).

24. On information and belief, since September 11, 2001, the United States has undertaken covert "extraordinary renditions," removing non-U.S. citizens detained in this country and elsewhere and suspected -- reasonably or unreasonably – of terrorist

activity to countries, including Syria, where interrogations under torture are routine. The Federal officials who have adopted, ratified, and/or implemented the "extraordinary renditions" policy know full well that non-U.S. citizens removed under this policy will be interrogated under torture. On information and belief, U.S. officials remove these non-U.S. citizens to countries like Syria precisely because those countries can and do use methods of interrogation to obtain information from detainees that would not be morally acceptable or legal in the United States and other democracies. Indeed, these officials have facilitated such human rights abuses, exchanging dossiers with intelligence officials in the countries to which non-U.S. citizens are removed. *See e.g.*, Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terrorist Suspects*, WASH. POST, March 11, 2002 at A01; Dana Priest and Barton Gellman, *U.S Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01; Sebastian Rotella, *Key to U.S. Case Denies Iraq-Al Qaeda Link*, L.A. TIMES, Feb. 1, 2003, at A01; DeNeen Brown and Dana Priest, *Deported Syrian Suspect Details Torture in Syria*, WASH. POST, Nov. 5, 2003 at A01 (Exhibit C attached to this complaint).

Facts Specific to Plaintiff

25. While on a family vacation in Tunisia in late September 2002, Mr. Arar received an e-mail from his former employer, MathWorks, asking him to

return to Ottawa to consult with a prospective client. On September 25, 2002, Mr. Arar took a flight to Zurich, leaving his wife and two children behind to continue their vacation. After stopping overnight in Zurich, he boarded a flight to Montreal, with a transfer stop at John F. Kennedy Airport, New York ("JFK").

26. At around noon, on September 26, 2002, Mr. Arar debarked at JFK in order to catch his connecting flight. He was not applying to enter the United States at this time. Mr. Arar presented his valid Canadian passport to the immigration inspector on duty. Upon entering Mr. Arar's name into a computer, the inspector instructed Mr. Arar to wait nearby.

27. At about 2 p.m., an immigration officer fingerprinted and photographed Mr. Arar. Shortly thereafter, two uniformed men searched Mr. Arar's wallet, carry-on bags, and luggage, without his consent. Concerned that he would miss his connecting flight, Mr. Arar repeatedly asked to make a telephone call home. His requests were ignored.

28. At around 4 p.m., three or four men arrived in the area where Mr. Arar was being detained. One told Mr. Arar that he wanted to ask him some questions. He assured Mr. Arar that he would be permitted to make his connecting flight after answering the questions. When Mr. Arar asked if he could call a lawyer, he was told that only U.S. citizens were entitled to lawyers.

29. Mr. Arar was then interrogated for approximately five hours by an FBI agent. The agent constantly yelled and swore at Mr. Arar, calling him a "fucking smart guy" with a "fucking selective memory." When Mr. Arar took more than a few seconds to respond to the rapid-fire questions, the agent became angry.

30. Referring to an undisclosed report, the FBI agent interrogating Mr. Arar questioned him about his work and travel in the United States and his relationships with certain individuals including, in particular, Mr. Abdullah Almalki. Mr. Arar explained that Mr. Almalki was a casual acquaintance of his from Ottawa. In 1997, Mr. Almalki had witnessed an apartment rental agreement signed by Mr. Arar. Mr. Arar had last seen Mr. Almalki in October 2001 when they had lunch together.

31. Following the five-hour interrogation, Mr. Arar was questioned for another three hours, this time by an immigration officer who asked Mr. Arar about his membership in or affiliation with various terrorist groups. Mr. Arar vehemently denied any such membership or affiliation. That interrogation ended at about midnight.

32. Mr. Arar then was chained and shackled, put in a vehicle, and driven to another building at JFK, where he was placed in solitary confinement. There was no bed. The lights remained on all night.

Mr. Arar did not sleep at all.

33. The next morning, September 27, 2002, beginning at about 9 a.m., two FBI agents interrogated Mr. Arar for about five hours, asking him about Osama Bin Laden, Iraq, and Palestine, among other things. During the interrogation, the agents constantly yelled and swore at Mr. Arar. Mr. Arar vehemently denied any connection to terrorists or terrorist activity. He repeatedly asked to see a lawyer and to make a telephone call but these requests were ignored.

34. At about 2 p.m., Mr. Arar was taken back to his cell and chained and shackled. He was given a cold McDonalds meal -- his first food in almost two days.

35. Early that evening, an immigration officer came to Mr. Arar's cell. He asked that Mr. Arar "volunteer" to be sent to Syria. Mr. Arar refused, insisting that he be sent to Canada or Switzerland. Angered by this response, the officer stated that the United States government had a "special interest" in Mr. Arar. The officer instructed Mr. Arar to sign a form. Even though Mr. Arar was not allowed to read the form, he signed it, fearing adverse consequences if he did not do so.

36. Later that evening, Mr. Arar was taken from his cell in chains and shackles, put in a vehicle,

and driven from JFK to the Metropolitan Detention Center, a federal detention facility located in Brooklyn, New York ("MDC"). There he was strip searched, given an orange jumpsuit to wear, and placed in solitary confinement in a small cell.

37. Over the next three days, until October 1, 2002, Mr. Arar repeatedly asked to see a lawyer and make a telephone call but these requests were ignored.

38. On October 1, 2002, an MDC official handed Mr. Arar a document stating that the INS had found him inadmissible in the United States because he belonged to an organization designated by the Secretary of State as a Foreign Terrorist Organization, namely, Al Qaeda. Mr. Arar was never given a meaningful opportunity to contest this finding.

39. The same day, Mr. Arar finally was permitted to make a telephone call. He called his mother-in-law in Ottawa, Canada. Since September 26, 2002, Mr. Arar's family had been frantically searching for him. Upon learning that he was detained at MDC, they contacted the Office for Canadian Consular Affairs, which had not been informed by the United States of Mr. Arar's detention. They also retained Ms. Amal Oummih, a New York City immigration attorney.

40. On October 3, 2002, Mr. Arar was visited

by Maureen Girvan from the Canadian Consulate. Mr. Arar showed Ms. Girvan the document finding him inadmissible in the United States. He expressed concern that he might be removed to Syria. Ms. Girvan assured Mr. Arar that could not happen, noting that he was a Canadian citizen.

41. The next day, October 4, 2002, two immigration officers visited Mr. Arar's cell. They asked him to designate in writing the country to which he wished to be removed. Mr. Arar designated Canada.

42. On the evening of Saturday, October 5, 2002, Mr. Arar was visited by Ms. Oummih, who had requested permission from the MDC Warden the day before to meet with Mr. Arar.

43. Late the next evening, Sunday, October 6, 2002, Mr. Arar was taken in chains and shackles to a room where approximately seven INS officials questioned him about his opposition to removal to Syria. Mr. Arar had no prior notice of this interrogation. The only notice given Ms. Oummih was a message left by Defendant McElroy, District Director for Immigration and Naturalization Services for New York City, on her voice mail at work that same evening. Ms. Oummih did not retrieve the message until she arrived at work the next day, Monday morning, October 7, 2002 – long after Mr. Arar's interrogation had ended.

44. Initially, Mr. Arar told his interrogators that he would not answer questions without Ms. Oummih. He reluctantly changed his mind only after being falsely told by his interrogators that Ms. Oummih chose not to attend the session. Mr. Arar told his interrogators that he feared that if he was removed to Syria, he would be tortured. Mr. Arar fully substantiated his claims about the likelihood of being tortured there.

45. The interrogation lasted for six hours, until the very early morning of October 7, 2002. Throughout the interrogation, Mr. Arar was informed that his interrogators were discussing the issue with "Washington D.C." At the conclusion of the interrogation, although no decision was related to Mr. Arar, Mr. Arar was asked to sign what appeared to be a transcript. He declined to do so. Mr. Arar was taken back to his cell in chains and shackles.

46. On the morning of October 7, 2002, Ms. Oummih received a call from an INS official falsely notifying her that Mr. Arar had been taken to the INS's Varick Street offices "for processing" en route to a detention facility in New Jersey. Later that day, she received another call from an INS official falsely notifying her that Mr. Arar had arrived at the New Jersey detention facility. Ms. Oummih was told to call back the next day for the exact location. In fact, Mr. Arar remained at MDC for this entire period.

47. Early on October 8, 2002, at about 4 a.m., Mr. Arar was taken in chains and shackles to a room where two INS officials told him that, based on Mr. Arar's casual acquaintance with certain named individuals, including Mr. Almalki as well as classified information, Defendant Blackman, Regional Director for the Eastern Region of Immigration and Naturalization Services, had decided to remove Mr. Arar to Syria. Without elaboration, Defendant Blackman also stipulated that Mr. Arar's removal to Syria would be consistent with Article 3 of CAT. When Mr. Arar repeated his concerns about torture, the officials present simply stated that the INS is not governed by the "Geneva Convention." They further told Mr. Arar that he was barred from re-entering the United States for five years. (A copy of Defendant Blackman's decision is attached as Exhibit D.)

48. On information and belief, Defendant Thompson, Deputy Attorney General, in his capacity as Acting Attorney General, signed an order on or about October 8, 2002, removing Mr. Arar to Syria.

49. After the interrogation, Mr. Arar was taken from MDC in chains and shackles to a New Jersey airfield, placed on a small private jet, and flown to Washington, D.C. From there, Mr. Arar was flown to Amman, Jordan, where he was turned over to Jordanian authorities on October 9, 2002. On information and belief, Syrian officials refused to accept Mr. Arar directly from the United States.

50. After interrogating and beating him, on or about October 9, 2002, Jordanian authorities turned Mr. Arar over to Syrian authorities. For the next 10 months, until about August 19, 2003, Mr. Arar was detained in the Palestine Branch of Syrian Military Intelligence ("the Palestine Branch").

51. For the first 12 days of his detention in Syria, Mr. Arar was interrogated for 18 hours per day. He was also subjected to physical and psychological torture. Syrian security officers regularly beat him on the palms, hips, and lower back, using a two-inch thick electric cable. They also regularly struck Mr. Arar in the stomach, face, and back of the neck with their fists. The pain was excruciating. Mr. Arar pleaded with them to stop, to no avail.

52. Syrian security officers continued also subjected Mr. Arar to severe psychological torture. They placed him in a room where he could hear the screams of other detainees being tortured. They also repeatedly threatened to place him in the spine-breaking "chair," hang him upside down in a "tyre" and beat him, and give him electric shocks.

53. To minimize the torture, Mr. Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan. In fact, Mr. Arar has never been to Afghanistan and has never been involved in terrorist activity.

54. The questions asked Mr. Arar by Syrian security officers in the Palestine Branch bore a striking similarity to those asked Mr. Arar by FBI agents at JFK in September, 2002. As with the FBI agents, Syrian security officers focused on Mr. Arar's relationship with certain individuals, including in particular, Abdullah Almalki.

55. On information and belief, Defendants provided their Syrian counterparts with a dossier on Mr. Arar, compiled in part from the interrogations at JFK. On information and belief, Defendants suggested matters to be covered by Syrian security officers during Mr. Arar's interrogation. On information and belief, Defendants handed over Mr. Arar to Syrian officials intending that they interrogate him under torture or knowing full well that Mr. Arar would be tortured during those interrogations.

56. On information and belief, Syrian security officers turned over to the Defendants all information coerced from Mr. Arar during his interrogations under torture in Syria. A Syrian official familiar with Mr. Arar's case stated that during Mr. Arar's detention in Syria, the Syrian government shared information gleaned from its interrogation and investigation of Mr. Arar with the United States government. *See* 1/21/04 transcript of CBS's Sixty Minutes II: "His Year In Hell" (Exhibit E attached to this complaint).

57. On information and belief, United States officials removed Mr. Arar to Syria so that Syrian security officers could interrogate him under torture and thereby obtain information for United States counter-terrorism operations. On information and belief, United States officials removed Mr. Arar to Syria under the above "extraordinary rendition" policy.

58. When not being interrogated, Mr. Arar was placed in a tiny underground cell, measuring approximately six feet long, seven feet high, and three feet wide -- hardly enough room to even move. The cell was damp and cold, especially during the winter months. The only light came through a small aperture in the ceiling above -- an aperture which rats ran across and through which cats often urinated onto Mr. Arar.

59. Sanitary conditions were almost nonexistent. Mr. Arar was allowed to bathe -- in cold water -- only once a week. He was not permitted to exercise. The food was barely edible. While detained at the Palestine Branch, Mr. Arar lost approximately 40 pounds.

60. The intensive interrogations and severe physical beatings of Mr. Arar ceased on or about October 20, 2002, the same day that the Canadian Embassy officials in Syria inquired about Mr. Arar. The next day, Syrian officials confirmed to Canadian

Embassy officials that Mr. Arar was in their custody. United States officials had refused even to acknowledge to Ms. Oummih, Mr. Arar's immigration attorney, or to Ms. Girvan, the Canadian Consulate staff person who visited Mr. Arar at MDC, that Mr. Arar had been removed to Syria.

61. Between October 23, 2002 and August 14, 2003, Syrian officials allowed Canadian Consular officials to visit Mr. Arar on seven occasions. Prior to each visit, Syrian security officers threatened Mr. Arar with additional torture if he complained about his mistreatment to his visitors. Mr. Arar complied until August 14, 2003. On that date, unable to bear the mistreatment any longer, Mr. Arar yelled out to a Canadian Consular official that he had been tortured and was being kept in a grave.

62. Approximately five days later, Mr. Arar was briefly transferred to the Syrian Military Intelligence's Investigations Branch. Prior to the transfer, Mr. Arar was forced to sign a false confession that he had undertaken terrorist training in Afghanistan. From the Investigation Branch, Mr. Arar was transferred to Sednaya Prison, an overcrowded Syrian prison facility where Mr. Arar remained for about six weeks.

63. On September 28, 2003, Mr. Arar was transferred back to the Palestine Branch. He was held in solitary confinement for a week. During this

time, Mr. Arar was confined in a room where, day and night, he could hear detainees screaming from torture.

64. On October 5, 2003, Mr. Arar was taken to the Syrian Supreme State Security Court. There, a prosecutor told him that he would be released without criminal charges. That same day, Mr. Arar was released into the custody of Canadian Embassy officials in Damascus, Syria.

65. According to Imad Moustapha, Syria's highest-ranking diplomat in Washington, Syrian officials investigated every link and relationship in order to unvocer a connection between Mr. Arar and Al Qaeda, but could find no such connection. Mr. Moustapha said that Syria eventually released Mr. Arar because Syria wanted to make "a gesture of goodwill to Canada," and because Syrian officials "could not substantiate any of the allegations against him." Syria now considers Mr. Arar completely innocent. (*See* Exhibit E).

66. On October 6, 2003, Mr. Arar returned home to Ottawa to his family whom he had not seen in more than a year.

67. Mr. Arar continues to suffer the effects of his ordeal. He still experiences difficulties relating to his wife and two young children. He frequently has nightmares about his treatment in the United

States and Syria. People continue to call him a terrorist. The publicity surrounding his situation has made finding employment particularly difficult. His employment prospects have been further undermined by his inability to travel to the United States.

GENERAL ALLEGATIONS

68. Mr. Arar's treatment, including his torture in Jordan and Syria, was inflicted under color of law and under color of official authority, and/or in conspiracy with or on behalf of those acting under color of official authority.

69. At all relevant times, the Defendants were part of a conspiracy to interrogate Mr. Arar under torture. Other conspirators, including unnamed Jordanian and Syrian officials, planned and effected the aforementioned torture, together with the Defendants named herein.

70. At all relevant times, the Defendants acted in concert with unnamed Jordanian and Syrian officials so as to effect the torture described herein.

71. Defendants are liable for the acts of described herein in that Defendants directed, ordered, confirmed, acquiesced or conspired and/or aided and abetted in bringing them about.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Torture Victim Protection Act: Prohibition Against Torture)

72. Plaintiff incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

73. The acts described herein constitute a violation of the right not to be tortured under color of foreign law. Violation of this right is actionable under the Torture Victim Protection Act, 28 U.S.C. § 1350, note.

74. Defendants Ashcroft, Thompson, Ziglar, Blackman, McElroy, Mueller, and others, are liable for said conduct in that acting in concert with unnamed Jordanian and Syrian officials they conspired in and/or aided and abetted in bringing about the violations of Plaintiff's right not to be tortured under color of Syrian law.

75. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered physical harm, emotional distress, and economic loss.

SECOND CLAIM FOR RELIEF

(Fifth Amendment: Substantive Due Process - Torture)

76. Plaintiff incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

77. Defendants agreed amongst themselves and with unnamed Syrian officials to deport Plaintiff to Syria for the purpose coercive interrogation and torture in that country. In furtherance of their agreements, Defendants detained Plaintiff, denied him access to counsel, the courts, and his consulate, and used government resources to transfer Plaintiff to Syrian custody. By conspiring to consign and transport Plaintiff to Syria for the purposes of interrogation and torture there, Defendants, acting under color of law and their authority as federal officers, intentionally subjected Plaintiff to torture and coercive interrogation, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

78. At the time they seized Plaintiff and subsequently transported him to Syria, Defendants were fully aware of the policy of state-sponsored torture in that country and of Syria's plan to interrogate Plaintiff under torture, and knowingly gave substantial assistance to the Syrian government's plan by de-

taining Plaintiff, denying him access to counsel, the courts, and his consulate, and by using government resources to transfer him to Syria. By aiding and abetting Syria's plan to interrogate Plaintiff under torture, Defendants, acting under color of law and their authority as federal officers, knowingly or recklessly subjected Plaintiff to torture and coercive interrogation, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

79. By arbitrarily detaining Plaintiff and transporting him to Syria for interrogation and torture there, Defendants entered into a special relationship with Plaintiff and then placed Plaintiff in a position more vulnerable to danger than he would have been had Defendants not acted as they did. By doing so, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly subjected Plaintiff to torture and coercive interrogation, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

80. The harms that Plaintiff suffered were foreseeable to Defendants.

81. Plaintiff has no effective means of enforcing his Fifth Amendment due process rights other than by seeking declaratory and other relief from the Court.

82. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered physical harm, emotional distress, and economic loss.

THIRD CLAIM FOR RELIEF

(Fifth Amendment: Substantive Due Process - Detention)

83. Plaintiff incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

84. Defendants agreed amongst themselves and with Syrian officials to deport Plaintiff to Syria for the purpose arbitrary, indefinite detention in that country. In furtherance of their agreements, Defendants detained Plaintiff, denied him access to counsel, the courts, and his consulate, and used their own resources to transfer Plaintiff to Syrian custody. By conspiring to consign and transport Plaintiff to Syria for the purposes of arbitrary, indefinite detention there, Defendants, acting under color of law and their authority as federal officers, intentionally subjected Plaintiff to arbitrary, indefinite detention, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

85. At the time they seized Plaintiff and subsequently transported him to Syria, Defendants were fully aware of Syria's practice of arbitrary and in-

definite detention without trial and of Syria's plan to arbitrarily detain Plaintiff without trial there, and knowingly gave substantial assistance to the Syrian government's plan by detaining Plaintiff denying him access to counsel, the courts, and his consulate and by using government resources to transport him to Syria. By aiding and abetting Syria's plan to arbitrarily detain Plaintiff, Defendants, acting under color of law and their authority as federal officers, knowingly or recklessly subjected Plaintiff to arbitrary detention without trial, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

86. By arbitrarily detaining Plaintiff and rendering him to Syria for arbitrary and indefinite detention without trial there, Defendants entered into a special relationship with Plaintiff and placed him in a position more vulnerable to danger than he would have been had Defendants not acted as they did. By doing so, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly subjected Plaintiff to arbitrary, indefinite detention without trial, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

87. The harms that Plaintiff suffered was foreseeable to the Defendants.

88. Plaintiff has no effective means of enforc-

ing his Fifth Amendment due process rights other than by seeking declaratory and other relief from the Court.

89. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered physical harm, emotional distress, and economic loss.

FOURTH CLAIM FOR RELIEF
(Fifth Amendment: Substantive Due Process – Domestic Detention)

90. Plaintiff incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

91. By subjecting Plaintiff to outrageous, excessive, cruel, inhuman, and degrading conditions of confinement, Defendants, acting under color of law and their au thority as federal officers, intentionally or recklessly subjected Plaintiff to arbitrary detention, taking his liberty without due process of law in violation of the Fifth Amendment to the Constitution.

92. By subjecting Plaintiff to coercive and involuntary custodial interrogation designed to overcome his will and compel incriminating statements from him, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly violated Plaintiff's right to due process

under the Fifth Amendment to the Constitution.

93. By subjecting Plaintiff to a "communications blackout" and other measures while in custody that interfered with his access to lawyers and the courts, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly violated Plaintiff's right to obtain access to legal counsel and to petition the courts for redress of his grievances, and his right to due process under the Fifth Amendment to the Constitution.

94. Plaintiff has no effective means of enforcing his Fifth Amendment due process rights other than by seeking declaratory and other relief from the Court.

95. As a proximate result of Defendants' unlawful conduct, Plaintiff has suffered physical harm, emotional distress, and economic loss.

PRAYER FOR RELIEF

WHEREFORE, Mr. Arar respectfully requests that the Court enter a judgment:

1. Declaring that the actions of Defendants, their agents, and their employees, are illegal and violate Mr. Arar's constitutional, civil, and international human rights;

2. Awarding compensatory and punitive damages to Mr. Arar in an amount that is fair, just, and reasonable;

3. Awarding reasonable attorneys' fees and costs of suit, and

4. Ordering such further relief as the Court considers just and proper.

Dated: New York, New York
January 22, 2004

Respectfully submitted,
Center for Constitutional Rights

By: [Signature]
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EXHIBIT A

U.S. Dept. of State, Bureau Of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2002: Syria* § 1c (Mar. 31, 2003)

Syria
Country Reports on Human Rights Practices
Bureau of Democracy, Human Rights, and Labor
2002
March 31, 2003

Syria is a republic under a military regime with virtually absolute authority in the hands of the President. Despite the existence of some institutions of democratic government, the President, with counsel from his ministers, high-ranking members of the ruling Ba'th Party, and a relatively small circle of security advisers, makes key decisions regarding foreign policy, national security, internal politics, and the economy. All three branches of government are influenced to varying degrees by leaders of the Ba'th Party, whose primacy in state institutions and the Parliament is mandated by the Constitution. The Parliament may not initiate laws but only assesses and at times modifies those proposed by the executive branch. The Constitution provides for an independent judiciary, but security courts are subject to political influence. The regular courts generally display independence, although political connections and bribery may influence verdicts.

The powerful role of the security services in government, which extends beyond strictly security matters, stems in part from the state of emergency that has been in place almost continuously since 1963. The Government justifies martial law because of the state of war with Israel and past threats from terrorist groups. Syrian Military Intelligence and Air Force Intelligence are military agencies, while General Security, State Security, and Political Security come under the purview of the Ministry of Interior. The branches of the security services operated independently of each other and outside the legal system. The security forces were under effective government control. Their members committed serious human rights abuses.

The population of the country was approximately 17 million. The economy was based on commerce, agriculture, oil production, and government services. Economic growth was hampered by the still dominant state role in the economy, a complex bureaucracy, overarching security concerns, endemic corruption, currency restrictions, a lack of modern financial services and communications, and a weak legal system.

The Government's human rights record remained poor, and it continued to commit serious abuses. Citizens did not have the right to change their government. The Government used its vast powers to prevent any organized political opposition, and there

have been very few antigovernment manifestations. Continuing serious abuses included the use of torture in detention; poor prison conditions; arbitrary arrest and detention; prolonged detention without trial; fundamentally unfair trials in the security courts; an inefficient judiciary that suffered from corruption and, at times, political influence; and infringement on privacy rights. The Government significantly restricted freedom of speech and of the press. Freedom of assembly does not exist under the law and the Government restricted freedom of association. The Government did not officially allow independent domestic human rights groups to exist; however, it permitted periodic meetings of unlicensed civil society forums throughout the year. The Government placed some limits on freedom of religion and freedom of movement. Proselytizing by groups it considered Zionist was not tolerated, and proselytizing in general was not encouraged. Violence and societal discrimination against women were problems. The Government discriminated against the stateless Kurdish minority, suppressed worker rights, and tolerated child labor in some instances.

RESPECT FOR HUMAN RIGHTS

Section 1 Respect for the Integrity of the Person, Including Freedom From:

a. Arbitrary or Unlawful Deprivation of Life

There were no reports of political killings or other killings committed by government forces during the year.

In November 2000, a number of armed clashes occurred between Bedouin shepherds and Druze residents of Suwayda Province that required government military intervention to stop. Local press reported that between 15 and 20 Druze, Bedouin, and security forces personnel were killed (see Section 5). Some members of the security forces committed a number of serious human rights abuses. In its Annual Report, the Syrian Human Rights Commission stated that in 2001 and during the year three individuals died in detention (see Section 1.c.). The Government has not investigated previous deaths in detention.

b. Disappearance

There were no new confirmed reports of politically motivated disappearances during the year. Because security forces often did not provide detainees' families with information regarding their welfare or location, many persons who disappeared in past years are believed to be in long-term detention or to have died in detention. The number of new disappearances has declined in recent years, although this may be due to the Government's success in deterring opposition political activity rather than a loosening of the criteria for detention (see Section 1.d.).

Despite inquiries by international human rights organizations and foreign governments, the Government offered little new information on the welfare and whereabouts of persons who have been held incommunicado for years or about whom little is known other than the approximate date of their detention. The Government claimed that it has released all Palestinians and Jordanian and Lebanese citizens who reportedly were abducted from Lebanon during and after Lebanon's civil war. However, the Government's claim was disputed by Lebanese nongovernmental organizations (NGOs), Amnesty International (AI), and other international NGOs, as well as some family members of those who allegedly remain in the country's prisons (see Section 1.d.).

c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

Despite the existence of constitutional provisions and several Penal Code penalties for abusers, there was credible evidence that security forces continued to use torture, although to a lesser extent than in previous years. Former prisoners, detainees, and the London-based Syrian Human Rights Organization reported that torture methods included administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a

chair that bends backwards to asphyxiate the victim or fracture the victim's spine. In 2001 AI published a report claiming that authorities at Tadmur Prison regularly tortured prisoners, or forced prisoners to torture each other. Although it occurs in prisons, torture was most likely to occur while detainees were being held at one of the many detention centers run by the various security services throughout the country, especially while the authorities were attempting to extract a confession or information.

The Government has denied that it uses torture and claims that it would prosecute anyone believed guilty of using excessive force or physical abuse. Past victims of torture have identified the officials who tortured them, up to the level of brigadier general. If allegations of excessive force or physical abuse are to be made in court, the plaintiff is required to initiate his own civil suit against the alleged abuser. Courts did not order medical examinations for defendants who claimed that they were tortured (see Section 1.e.). There were no substantiated allegations of torture during the year.

In 2000 the Government apprehended Raed Hijazi, accused of a terrorist plot targeting American and Israeli tourists in Jordan during the millennium celebrations, and sent him to Jordan to stand trial. According to media accounts of the trial, doctors for both the defense and the prosecution testified that Hijazi's body showed signs of having been beaten,

but witnesses, including Hijazi, made contradictory and inconclusive claims regarding whether the alleged abuse occurred while he was in Jordanian or Syrian custody. The Jordanian court has rejected the allegations that Hijazi's confession was coerced. In February the Jordanian authorities sentenced Hijazi to death. He has appealed the decision but remained in custody at year's end pending a decision.

Prison conditions generally were poor and did not meet international standards for health and sanitation. However, there were separate facilities for men, women, and children. Pre-trial detainees, particularly those held for political or security reasons, were usually held separately from convicted prisoners. Facilities for political or national security prisoners generally were worse than those for common criminals.

At some prisons, authorities allowed visitation, but in other prisons, security officials demanded bribes from family members who wished to visit incarcerated relatives. Overcrowding and the denial of food occurred at several prisons. According to Human Rights Watch, prisoners and detainees were held without adequate medical care, and some prisoners with significant health problems reportedly were denied medical treatment. Some former detainees have reported that the Government prohibited reading materials, even the Koran, for political prisoners.

In 2001 the London-based Syrian Human Rights Commission reported that three detainees died in prison and that their remains bore evidence of torture and extreme medical neglect.

The Government did not permit independent monitoring of prison or detention center conditions, although diplomatic or consular officials were granted access in high profile cases.

d. Arbitrary Arrest, Detention, or Exile

Arbitrary arrest and detention were significant problems. The Emergency Law, which authorizes the Government to conduct preventive arrests, overrides Penal Code provisions against arbitrary arrest and detention, including the need to obtain warrants. Officials contend that the Emergency Law is applied only in narrowly defined cases, and in January 2001, the regional press reported that the Information Minister claimed that the authorities had frozen "martial law." Nonetheless, in cases involving political or national security offenses, arrests often were carried out in secret. Suspects may be detained incommunicado for prolonged periods without charge or trial and are denied the right to a judicial determination regarding the pretrial detention. Some of these practices were prohibited by the state of emergency, but the authorities were not held to these strictures. Additionally, those suspected of political or national security offenses may be arrested and

prosecuted under ambiguous and broad articles of the Penal Code, and subsequently tried in either the criminal or security courts, as occurred with the 10 civil society activists arrested in August and September 2001. During the year, two were tried and sentenced in criminal court and eight were tried and sentenced in secrecy in the Supreme State Security Court under the Emergency Law's authority. All were initially held incommunicado and in solitary confinement, though the criminal court trials and initial sessions of one of the other trials were open to the press and diplomats.

The Government detained relatives of detainees or of fugitives in order to obtain confessions or the fugitive's surrender (see Section 1.f.). The Government also threatened families or friends of detainees, at times with the threat of expulsion, to ensure their silence, to force them to disavow publicly their relatives, or to force detainees into compliance.

Defendants in civil and criminal trials had the right to bail hearings and the possible release from detention on their own recognizance. Bail was not allowed for those accused of state security offenses. Unlike defendants in regular criminal and civil cases, security detainees did not have access to lawyers prior to or during questioning.

Detainees had no legal redress for false arrest. Security forces often did not provide detainees' families

with information regarding their welfare or location while in detention. Consequently many persons who have disappeared in past years are believed to be in long-term detention without charge or possibly to have died in detention (see Section 1.b.). Many detainees brought to trial have been held incommunicado for years, and their trials often have been unfair (see Section 1.e.). In the past, there were reliable reports that the Government did not notify foreign governments when their citizens were arrested or detained.

Pretrial detention may be lengthy, even in cases not involving political or national security offenses. The criminal justice system is backlogged. Many criminal suspects were held in pretrial detention for months and may have their trials extended for additional months. Lengthy pretrial detention and drawn-out court proceedings are caused by a shortage of available courts and the absence of legal provisions for a speedy trial or plea bargaining (see Section 1.e.).

In May 2001, the Government released prominent political prisoner Nizar Nayyuf, who had been imprisoned since 1992 for founding an unlawful organization, disseminating false information, and undermining the Government; he immediately was placed under house arrest. In June 2001, the Government allowed Nayyuf to leave the country for medical treatment. In September 2001, Nayyuf was summoned to appear before an investigating court to re-

spond to a complaint against him filed by Ba'th party lawyers for "inciting confessionalism, attempting to illegally change the Constitution, and publishing false reports abroad." Nayyuf had not returned by year's end. The NGO Reporters Without Borders (RSF) claimed that the Government harassed and intimidated members of Nayyuf's family following the issuance of the summons. The Government reportedly fired two members of his immediate family from their jobs. The municipality threatened to expel members of Nayyuf's family if they did not disavow publicly his statements (see Section 4).

In August 2001, the Government arrested independent Member of Parliament Ma'mun Humsi during his hunger strike protesting official corruption, the excessive powers of the security forces, and the continuation of the Emergency Law. In a departure from previous practice, the Interior Ministry issued a statement justifying Humsi's arrest under Penal Code articles dealing with crimes against state security (see Section 3). In September 2001, the Government detained independent Member of Parliament Riad Seif shortly after Seif reactivated his unlicensed political discussion forum. The principal charge against both individuals was attempting to illegally change the Constitution (see Section 3). In March and April, Humsi and Seif were convicted in criminal court of attempting to change the Constitution illegally and each sentenced to 5 years in prison (see Section 1.e.).

In September 2001, the Government detained prominent political activist and longtime detainee Riad al-Turk for violations of Penal Code articles dealing with crimes against state security, after al-Turk made derogatory public comments about late President Hafiz al-Asad. In June Al-Turk was convicted in closed Supreme State Security Court of attempting to change the Constitution illegally and sentenced to 30 months in prison (see Section 1.e.). On November 16, President Asad ordered Al-Turk released on humanitarian grounds.

In September 2001, the Government detained seven additional prominent human rights activists who had issued statements in support of Humsi, Seif, and al-Turk. The Government reportedly charged the seven activists under Penal Code articles dealing with crimes against state security (see Section 2.a.). Although all of the 10 civil society activists were arrested for Penal Code violations, only Humsi and Seif were tried in criminal court while all the others were tried in the Supreme State Security Court under the authority of the Emergency Law (see Section 1.e.).

At year's end, the leaders of the Turkomen who reportedly were detained without charge in 1996, remained in detention.

In 1999 and 2000, there were reports of arrests of hundreds of Syrian and Palestinian Islamists. Most of those arrested reportedly were released after sign-

ing an agreement not to participate in political activities; however, some may remain in detention. At year's end, there were no new reports on those detained. There were no credible reports that the Government arrested Islamists on political charges during the year.

There were no reports of the arrests of minors on political charges during the year.

In January 2001, the Jordanian press reported the release from Syrian jails of six Jordanian prisoners of Palestinian origin, who had been imprisoned for membership in Palestinian organizations. Between May and July 2000, there were unconfirmed reports that a large number of Jordanian prisoners were released. However, according to AI, only three of the Jordanians released in 2000 had been held for political reasons.

In March 2001, Syrian intelligence officials in Lebanon arrested three Syrian Druze men who had converted to Christianity, possibly on suspicion of membership in Jehovah's Witnesses. The men were released after 2 months.

In July and August 2001, there were unconfirmed regional press reports that approximately 500 political detainees were moved from Tadmur Prison to Saydnaya Prison in preparation for the eventual closing of Tadmur. In 2000 the Government also

closed the Mazzah prison, which reportedly held numerous prisoners and detainees. In August, AI reported the release of Communist Action Party member Haytham Na'al after 27 years in prison.

In 2000 the Government declared an amnesty for 600 political prisoners and detainees and a general pardon for some nonpolitical prisoners. The highly publicized amnesty was the first time the Government acknowledged detention of persons for political reasons. There were no credible reports of transfers of political prisoners during the year.

Most of those arrested during crackdowns in the 1980s, in response to violent attacks by the Muslim Brotherhood, have been released; however, some may remain in prolonged detention without charge. Some union and professional association officials detained in 1980 may remain in detention (see Sections 2.b. and 6.a.).

The number of remaining political detainees is unknown. In June 2000, prior to the November 2000 prison amnesty, Amnesty International estimated that there were approximately 1,500 political detainees; many of the detainees reportedly were suspected supporters of the Muslim Brotherhood and the pro-Iraqi wing of the Ba'th party. There also were Jordanian, Lebanese, and Palestinian political detainees. Estimates of detainees are difficult to confirm because the Government does not verify publicly the number of detentions without charge, the release of

detainees or amnestied prisoners, or whether detainees subsequently are sentenced to prison (see Section 1.e.).

Former prisoners were subject to a so-called "rights ban," which begins from the day of sentencing and lasts until 7 years after the expiration of the sentence, in the case of felony convictions. Persons subject to this ban are not allowed to vote, run for office, or work in the public sector; they often also are denied passports.

The Constitution prohibits exile; however, the Government has exiled citizens in the past. The Government refused to reissue the passports of citizens who fled the country in the 1980s; such citizens consequently are unable to return to the country.

There were no known instances of forced exile during the year.

e. Denial of Fair Public Trial

The Constitution provides for an independent judiciary, but the two exceptional courts dealing with cases of alleged national security violations were not independent of executive branch control. The regular court system generally displayed considerable independence in civil cases, although political connections and bribery at times influenced verdicts.

The judicial system is composed of the civil and criminal courts, military courts, security courts, and religious courts, which adjudicate matters of personal status such as divorce and inheritance (see Section 5). The Court of Cassation is the highest court of appeal. The Supreme Constitutional Court is empowered to rule on the constitutionality of laws and decrees; it does not hear appeals.

Civil and criminal courts are organized under the Ministry of Justice. Defendants before these courts were entitled to the legal representation of their choice; the courts appoint lawyers for indigents. Defendants were presumed innocent; they are allowed to present evidence and to confront their accusers. Trials are public, except for those involving juveniles or sex offenses. Defendants may appeal their verdicts to a provincial appeals court and ultimately to the Court of Cassation. Such appeals are difficult to win because the courts do not provide verbatim transcripts of cases--only summaries prepared by the presiding judges. There are no juries.

Military courts have the authority to try civilians as well as military personnel. A military prosecutor decides the venue for a civilian defendant. There have been reports that the Government operates military field courts in locations outside established courtrooms. Such courts reportedly observed fewer of the formal procedures of regular military courts.

In September a military court charged lawyer and Chairman of the Syrian Human Rights Committee, Haytham al-Maleh, and three of his associates in abstentia for spreading false news outside of the country, belonging to a political association of an international nature without government approval, and publishing material that causes sectarian friction.

The two security courts are the Supreme State Security Court (SSSC), which tries political and national security cases, and the Economic Security Court (ESC), which tried cases involving financial crimes. Both courts operated under the state of emergency, not ordinary law, and did not observe constitutional provisions safeguarding defendants' rights.
Charges against defendants in the SSSC often were vague. Many defendants appeared to be tried for exercising normal political rights, such as free speech. For example, the Emergency Law authorizes the prosecution of anyone "opposing the goals of the revolution," "shaking the confidence of the masses in the aims of the revolution," or attempting to "change the economic or social structure of the State." Nonetheless, the Government contends that the SSSC tries only persons who have sought to use violence against the State.

Under SSSC procedures, defendants are not present during the preliminary or investigative phase of the trial, during which the prosecutor presents evidence.

Trials usually were closed to the public. Lawyers were not ensured access to their clients before the trial and were excluded from the court during their client's initial interrogation by the prosecutor. Lawyers submitted written defense pleas rather than oral presentations. The State's case often was based on confessions, and defendants have not been allowed to argue in court that their confessions were coerced. There was no known instance in which the court ordered a medical examination for a defendant who claimed that he was tortured. The SSSC reportedly has acquitted some defendants, but the Government did not provide any statistics regarding the conviction rate. Defendants do not have the right to appeal verdicts, but sentences are reviewed by the Minister of Interior, who may ratify, nullify, or alter them. The President also may intervene in the review process.

Accurate information regarding the number of cases heard by the SSSC was difficult to obtain, although hundreds of cases were believed to pass through the court annually. Many reportedly involved charges relating to membership in various banned political groups, including the Party of Communist Action and the pro-Iraqi wing of the Ba'th Party. Sentences as long as 15 years have been imposed in the past. Since 1997 there have been no visits by human rights NGOs to attend sessions of the SSSC (see Section 4).

The 10 civil society activists arrested in August and September 2001 were tried in criminal and state security courts. In February independent Parliamentarians Mamun Humsi and Riyad Seif were tried in criminal court proceedings that were open, for the first time, to foreign observers and the press. AI noted that their parliamentary immunity was lifted without due attention to the procedures established by law. Humsi and Seif were denied confidential access to their lawyers throughout their detention and observers noted a number of procedural irregularities during the trials. In March and April, respectively, the Government sentenced Humsi and Seif to 5 years' imprisonment each for attempting to change the constitution illegally and inciting racial and sectarian strife.

During the year, the eight other civil society activists arrested in August and September 2001 were tried in secrecy by the Supreme State Security Court under authority of the Emergency Law. Only the first session of former political prisoner Riad al-Turk's trial was open to the media and international observers. Al-Turk was sentenced to 30 months for attempting to change the Constitution illegally but was released by presidential decree in November (see Section 1.d.). Lawyer and member of Seif and Humsi's defense team, Habib Issa, and physician and cofounder of the Syrian Human Rights Society, Walid al-Buni, were each sentenced to 5 years in prison for attempting to change the Constitution illegally. Economist and re-

gime critic Arif Dalila was sentenced to up to 10 years for the same offense. Civil society activist Habib Saleh received a 3-year sentence for opposing the objectives of the revolution and inciting ethnic and sectarian strife. Hassan Sa'dun, physician and member of the Committee for the Defense of Human Rights, Kamal al-Labwani, and engineer Fawaz Tillu were sentenced respectively to 2, 3, and 5 years in prison for instigating armed mutiny against the Government (see Sections 1.d., 2.a., and 3).

The ESC tried persons for alleged violations of foreign exchange laws and other economic crimes. The prosecution of economic crimes was not applied uniformly. Like the SSSC, the ESC did not ensure due process for defendants. Defendants were not provided adequate access to lawyers to prepare their defenses, and the State's case usually was based on confessions. High-ranking government officials may influence verdicts. Those convicted of the most serious economic crimes do not have the right of appeal, but those convicted of lesser crimes may appeal to the Court of Cassation. The Economic Penal Code allowed defendants in economic courts to be released on bail. The bail provision does not extend to those accused of forgery, counterfeiting, or auto theft; however, the amendment is intended to provide relief for those accused of other economic crimes, many of whom have been in pretrial detention for long periods of time. These amendments to the Economic Penal Code also limit the categories of cases that can be

tried in the ESC. In November 2001, the Government approved a general pardon for nonpolitical prisoners and a reduction of sentences by one-third for persons convicted of economic crimes, with a provision to commute sentences entirely for persons who return embezzled funds to investors within 1 year of the law's effective date.

At least two persons arrested when late President Asad took power in 1970 may remain in prison, despite the expiration of one of the prisoners' sentences.

The Government in the past denied that it held political prisoners, arguing that although the aims of some prisoners may be political, their activities, including subversion, were criminal. The official media reported that the 600 beneficiaries of the November 2000 amnesty were political prisoners and detainees; this reportedly was the first time that the Government acknowledged that it held persons for political reasons. Nonetheless, the Emergency Law and the Penal Code are so broad and vague, and the Government's power so sweeping, that many persons were convicted and are in prison for the mere expression of political opposition to the Government. The Government's sentencing of 10 prominent civil society and human rights activists for "crimes of state security" represented a retreat from recent modest attempts at political liberalization (see Sections 1.d. and 2.a.).

The exact number of political prisoners was unknown. Unconfirmed regional press reports estimated the total number of political prisoners at between 400 and 600. In April 2001, a domestic human rights organization estimated the number to be nearly 800, including approximately 130 belonging to the Islamic Liberation Party, 250 members and activists associated with the Muslim Brotherhood, 150 members of the pro-Iraq wing of the Ba'th Party, and 14 Communists. In its report for the year, the Syrian Human Rights Committee estimated that there were approximately 4,000 political prisoners still in detention.

f. Arbitrary Interference with Privacy, Family, Home, or Correspondence

Although laws prohibit such actions, the Emergency Law authorizes the security services to enter homes and conduct searches without warrants if security matters, very broadly defined, are involved. The security services selectively monitored telephone conversations and fax transmissions. The Government opened mail destined for both citizens and foreign residents. It also prevented the delivery of human rights materials (see Section 2.a.).

The Government continued its practice of threatening or detaining the relatives of detainees or of fugitives in order to obtain confessions, minimize outside interference, or prompt the fugitive's surrender (see

Section 1.d.). There have been reports that security personnel force prisoners to watch relatives being tortured in order to extract confessions. According to AI, security forces also detained family members of suspected oppositionists (see Section 1.d.).

In the past, the Government and the Ba'th Party monitored and attempted to restrict some citizens' visits to foreign embassies and cultural centers.

Section 2 Respect for Civil Liberties, Including:

a. Freedom of Speech and Press

The Constitution provides for the right to express opinions freely in speech and in writing, but the Government restricted these rights significantly in practice. The Government strictly controlled the dissemination of information and permitted little written or oral criticism of President Asad, his family, the Ba'th Party, the military, or the legitimacy of the Government. The Government also did not permit sectarian issues to be raised. Detention and beatings for individual expressions of opinion that violate these unwritten rules at times occurred. The Government also threatened activists to attempt to control their behavior. In January 2001, novelist Nabil Sulayman was attacked outside his apartment in Latakia. Some observers believed the attack was a message from the Government to civil society advocates to moderate their pressure for reform. The at-

tack came just after Information Minister Adnan 'Umran publicly criticized civil society advocates.

In a speech in February 2001, President Asad explicitly criticized civil society advocates as elites "from outside" who wrongly claim to speak for the majority and said that openness would only be tolerated as long as it "does not threaten the stability of the homeland or the course of development." The Government required all social, political, and cultural forums and clubs to obtain advance official approval for meetings, to obtain approval for lecturers and lecture topics, and to submit lists of all attendees (see Section 2.b.). During the year, several unapproved forums met, which while technically unhindered, were under government observation.

In January 2001, the regional press reported on a "Group of 1,000" intellectuals that issued a statement calling for more comprehensive reforms than those demanded by a group of 99 intellectuals in September 2000. The group's statement called for lifting martial law, ending the state of emergency that has been in effect since 1963, releasing political prisoners, and expanding civil liberties in accordance with the provisions of the Constitution. Although the Government did not take action immediately against any of the signatories, in September 2001 it detained seven prominent human rights figures, reportedly charging them under articles in the Penal Code dealing with crimes against state security. A number of

those detained were signatories of the "Group of 1,000" petition. The Government tried the 10 civil society and human rights activists in criminal and state security courts and sentenced them to 2 to 10 years in prison for crimes against state security (see Section 1.e.). In December 2000, a local human rights organization published an open letter in a Lebanese newspaper calling for the closure of the notorious Tadmur Prison.

The Emergency Law and Penal Code articles dealing with crimes against state security allow the Government broad discretion in determining what constitutes illegal expression. The Emergency Law prohibits the publication of "false information", which opposes "the goals of the revolution" (see Section 1.e.). Penal Code articles prohibit "attempting to illegally change the Constitution," "preventing authorities from executing their responsibilities," and "acts or speech inciting confessionalism." In August 2001, the Government amended the Press Law to permit the reestablishment of publications that were circulated prior to 1963 and established a framework in which the National Front Parties, as well as other approved private individuals and organizations, would be permitted to publish their own newspapers. However, the same amendments also stipulated imprisonment and stiff financial penalties as part of broad, vague provisions prohibiting the publication of "inaccurate" information, particularly if it "causes public unrest, disturbs international relations, vio-

lates the dignity of the state or national unity, affects the morale of the armed forces, or inflicts harm on the national economy and the safety of the monetary system." Persons found guilty of publishing such information were subject to prison terms ranging from 1 to 3 years and fines ranging from $10,000 to $20,000 (500,000 to 1 million Syrian pounds). The amendments also imposed strict punishments on reporters who do not reveal their government sources in response to government requests. Critics claimed that the amendment would increase self-censorship by journalists, and that it strengthened, rather than relaxed, restrictions on the press.

The Government imprisoned journalists for failing to observe press restrictions. Official media reported that journalist Ibrahim Hamidi was arrested on December 23 on charges of "publishing unfounded news," a violation of Article 51 of the 2001 Publication Law. Although the announcement did not specify the violation, it was believed to be a December 20 article in the London-based al-Hayat discussing the Government's contingency planning for possible hostilities in Iraq. At year's end, Hamidi still was detained by authorities and denied contact with his family. State security services were known to threaten local journalists, including with the removal of credentials, for articles printed outside the country. In April and May the Government refused to renew the press credentials and/or residency permits of several journalists for reasons including "ill-

intentioned reporting" and "violating the rules for accrediting correspondents and the tradition of the profession of journalism."
The Ministry of Information and the Ministry of Culture and National Guidance censored domestic and imported foreign press. They usually prevent the publication or distribution of any material deemed threatening or embarrassing by the security services to high levels of the Government. Censorship usually was stricter for materials in Arabic. Commonly censored subjects included: The Government's human rights record; Islamic fundamentalism; allegations of official involvement in drug trafficking; aspects of the Government's role in Lebanon; graphic descriptions of sexual activity; material unfavorable to the Arab cause in the Middle East conflict; and material that was offensive to any of the country's religious groups. In addition most journalists and writers practiced self-censorship to avoid provoking a negative government reaction.

There were several new private publications in 2000 and 2001, but only one appeared during this year. In January 2001, the Government permitted publication of the National Progressive Front's (NPF) Communist Party newspaper, The People's Voice. It became the first private paper distributed openly since 1963. In February 2001, the Government permitted publication of the NPF's Union Socialist Party's private newspaper, The Unionist. Also in February 2001, the Government permitted the publication of a

private satirical weekly newspaper, The Lamplighter, which criticized politically nonsensitive instances of government waste and corruption. In June 2001, the Government permitted the publication of the private weekly newspaper The Economist, which was critical of the performance of the Government.
In his July 2000 inaugural speech, President Bashar Al-Asad emphasized the principle of media transparency. Since July 2000, both the print and electronic media at times have been critical of Ba'th Party and government performance and have reported openly on a range of social and economic issues. While this relaxation of censorship did not extend to domestic politics or foreign policy issues, it was a notable departure from past practice. Some Damascus-based correspondents for regional Arab media also were able to file reports on internal political issues, such as rumored governmental changes, new political discussion groups, and the possible introduction of new parties to the Ba'th Party-dominated National Progressive Front.

The media continued to broaden somewhat their reporting on regional developments, including the Middle East peace process. The media covered some peace process events factually, but other events were reported selectively to support official views. The government-controlled press increased its coverage of official corruption and governmental inefficiency. A few privately owned newspapers published during

the year; foreign-owned, foreign-published newspapers continued to circulate relatively freely.

The Government or the Ba'th Party owned and operated the radio and television companies and most of the newspaper publishing houses. The Ministry of Information closely monitored radio and television news programs to ensure adherence to the government line. The Government did not interfere with broadcasts from abroad. Satellite dishes have proliferated throughout all regions and in neighborhoods of all social and economic categories, and in 2001 the Minister of Economy and Foreign Trade authorized private sector importers to import satellite receivers and visual intercommunication systems.

The Ministry of Culture and National Guidance censored fiction and nonfiction works, including films. It also approved which films may or may not be shown at the cultural centers operated by foreign embassies. The Government prohibited the publication of books and other materials in Kurdish; however, there were credible reports that Kurdish language materials were available in the country (see Section 5).

In 2000 cellular telephone service was introduced although its high cost severely limited the number of subscribers. Internet access and access to e-mail was limited but growing. The Government blocked access to selected Internet sites that contained information

deemed politically sensitive or pornographic in nature. The Government also consistently blocked citizens' access to servers that provide free e-mail services. The Government has disrupted telephone services to the offices and residences of several foreign diplomats, allegedly because the lines were used to access Internet providers outside the country.

The Government restricted academic freedom. Public school teachers were not permitted to express ideas contrary to government policy, although authorities allowed somewhat greater freedom of expression at the university level.

b. Freedom of Peaceful Assembly and Association

Freedom of assembly does not exist under the law. Citizens may not hold demonstrations unless they obtain permission from the Ministry of Interior. Most public demonstrations were organized by the Government or the Ba'th Party. The Government selectively permitted some demonstrations, usually for political reasons. The Government applied the restrictions on public assembly in Palestinian refugee camps, where controlled demonstrations have been allowed.

During the year there continued to be numerous demonstrations, most of which were permitted or organized by the Government, and some of which

were directed against diplomatic missions and international agencies in reaction to the Israeli Government's use of force against Palestinians in Israel, the West Bank, and Gaza.

In 2000 there were large demonstrations in Suwayda province following violent clashes between Bedouin shepherds and Druze residents of the province (see Sections 1.a. and 5).

The Government restricted freedom of association. During the year, it required private associations to register with authorities and denied several such requests, presumably on political grounds. The Government usually granted registration to groups not engaged in political or other activities deemed sensitive. The Government required political forums and discussion groups to obtain prior approval to hold lectures and seminars and to submit lists of all attendees. Despite these restrictions, during the year several domestic human rights and civil society groups held meetings without registering with the Government or obtaining prior approval for the meetings.

The authorities did not allow the establishment of independent political parties (see Section 3).

The Government sentenced 10 human rights activists who had called for the expansion of civil liberties and organized public dialogue to lengthy prison stays

for committing crimes against state security (see Sections 1.d. and 2.a.).

In 1980 the Government dissolved, and then reconstituted under its control, the executive boards of professional associations after some members staged a national strike and advocated an end to the state of emergency. The associations have not been independent since that time and generally are led by members of the Ba'th Party, although nonparty members may serve on their executive boards. At year's end, there was no new information on whether any persons detained in 1980 crackdowns on union and professional association officials remained in detention (see Sections 1.d. and 6.a.).

c. Freedom of Religion

The Constitution provides for freedom of religion, and the Government generally respected this right in practice; however, it imposed restrictions in some areas. The Constitution requires that the President be a Muslim. There is no official state religion; Sunni Muslims constitute the majority of the population.

All religions and orders must register with the Government, which monitors fund raising and requires permits for all meetings by religious groups, except for worship. There is a strict separation of religious institutions and the state. Religious groups tended to avoid any involvement in internal political affairs.

The Government in turn generally refrained from becoming involved in strictly religious issues.

The Government considers militant Islam a threat and follows closely the practice of its adherents. The Government has allowed many new mosques to be built; however, sermons are monitored and controlled, and mosques are closed between prayers.

In 1999 and 2000, there were large-scale arrests, and torture in some cases, of Syrian and Palestinian Islamists affiliated with the Muslim Brotherhood and the Islamic Salvation Party (see Sections 1.c. and 1.d.).

Officially all schools are government run and nonsectarian, although some schools are run in practice by Christian, Druze, and Jewish minorities. There is mandatory religious instruction in schools, with government-approved teachers and curriculums. Religion courses are divided into separate classes for Muslim, Druze, and Christian students. Although Arabic is the official language in public schools, the Government permits the teaching of Armenian, Hebrew, Syriac (Aramaic), and Chaldean in some schools on the basis that these are "liturgical languages."

Religious groups are subject to their respective religious laws on marriage, divorce, child custody, and inheritance (see Section 5).

Government policy officially disavows sectarianism of any kind. However, in the case of Alawis, religious affiliation can facilitate access to influential and sensitive posts. For example, members of the President's Alawi sect hold a predominant position in the security services and military, well out of proportion to their percentage of the population, estimated at 12 percent (see Section 3).

For primarily political rather than religious reasons, the less than 100 Jews remaining in the country generally are barred from government employment and do not have military service obligations. Jews are the only religious minority group whose passports and identity cards note their religion.

There generally was little societal discrimination or violence against religious minorities, including Jews.

For a more detailed discussion see the 2002 International Religious Freedom Report.

d. Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation

The Government limited freedom of movement. The Government restricted travel near the Golan Heights. Travel to Israel was illegal. Exit visas generally no longer were required for women, men over 50 years old, and citizens living abroad. Individuals have been denied permission to travel abroad on po-

litical grounds, although government officials deny that this practice occurs. The authorities may prosecute any person found attempting to emigrate or to travel abroad illegally, or who has been deported from another country, or who is suspected of having visited Israel. Women over the age of 18 have the legal right to travel without the permission of male relatives. However, a husband or a father may file a request with the Ministry of Interior to prohibit his wife or daughter's departure from the country (see Section 5). Security checkpoints continued, although primarily in military and other restricted areas. There were few police checkpoints on main roads and in populated areas. Generally the security services set up checkpoints to search for smuggled goods, weapons, narcotics, and subversive literature. The searches took place without warrants.

The Government has refused to recognize the citizenship of or to grant identity documents to some persons of Kurdish descent. Their lack of citizenship or identity documents restricts them from traveling to and from the country (see Section 5). Emigres who did not complete mandatory military service may pay a fee to avoid being conscripted while visiting the country.

As of June, 401,185 Palestinian refugees were registered with the U.N. Relief and Works Agency (UNRWA) in the country. In general Palestinian refugees no longer report unusual difficulties travel-

ling in and out of the country, as has been the case in the past. The Government restricted entry by Palestinians who were not resident in the country.

Citizens of Arab League countries may enter the country without a visa for a stay of up to 3 months, a period that is renewable on application to government authorities. Residency permits require proof of employment and a fixed address in the country.

The law does not provide for the granting of asylum or refugee status in accordance with the 1951 U.N. Convention Relating to the Status of Refugees or its 1967 Protocol. The Government cooperates on a case-by-case basis with the office of the United Nations High Commissioner for Refugees (UNHCR) and other humanitarian organizations in assisting refugees. The Government provides first asylum but is selective about extending protection to refugees; 2,260 persons sought asylum during the year. Although the Government denied that it forcibly repatriated persons with a valid claim to refugee status, it apparently did so in the past. In September there were 3,018 non-Palestinian refugees in the country, all of whom were receiving assistance from the UNHCR, including 1,812 refugees of Iraqi origin.

Section 3 Respect for Political Rights: The Right of Citizens to Change Their Government

Although citizens vote for the President and Members of Parliament, they did not have the right to change their government. The late President Hafiz Al-Asad was confirmed by unopposed referenda five times after taking power in 1970. His son, Bashar Al-Asad, also was confirmed by an unopposed referendum in July 2000. The Government is headed by a Cabinet, which the President has the discretion to change. Political opposition to the President is vigorously suppressed. The President and his senior aides, particularly those in the military and security services, ultimately make most basic decisions in political and economic life, with a very limited degree of public accountability. Moreover the Constitution mandates that the Ba'th Party is the ruling party and is ensured a majority in all government and popular associations, such as workers' and women's groups. Six smaller political parties are permitted to exist and, along with the Ba'th Party, make up the National Progressive Front (NPF), a grouping of parties that represents the sole framework of legal political party participation for citizens. While created to give the appearance of a multiparty system, the NPF is dominated by the Ba'th Party and does not change the essentially one-party character of the political system. Non-Ba'th Party members of the NPF exist as political parties largely in name only and conform strictly to Ba'th Party and government poli-

cies. In 2000 there were reports that the Government was considering legislation to expand the NPF to include new parties and several parties previously banned; however, at year's end, there were no new developments.

The Ba'th Party dominates the Parliament, which is known as the People's Council. Although parliamentarians may criticize policies and modify draft laws, the executive branch retains ultimate control over the legislative process. The Government has allowed independent non-NPF candidates to run for a limited allotment of seats in the 250-member People's Council. The allotment of non-NPF deputies was 83, ensuring a permanent absolute majority for the Ba'th Party-dominated NPF. Elections for the 250 seats in the People's Council last took place in 1998.

In March and April, the Government sentenced independent Members of Parliament Ma'mun Humsi and Riad Seif to 5 year prison terms for attempting to illegally change the Constitution (see Section 1.d.).

Persons convicted by the State Security Court may be deprived of their political rights after they are released from prison. Such restrictions include a prohibition against engaging in political activity, the denial of passports, and a bar on accepting government jobs and some other forms of employment. The duration of such restrictions is 7 years after expiration of the sentence in the case of felony convictions; how-

ever, in practice the restrictions may continue beyond that period. The Government contends that this practice is mandated by the Penal Code; it has been in effect since 1949.

Women and minorities, with the exception of the Jewish population and stateless Kurds (see Section 5), participated in the political system without restriction. There were 2 female cabinet ministers, and 26 of the 250 members of Parliament were women. No figures of the percentage of women and minorities who vote were available; however, citizens are required by law to vote.

Section 4 Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights

The Government did not allow domestic human rights groups to exist legally. Human rights groups have operated legally but ultimately were banned by the Government. The Government's sentencing of 10 civil society leaders this year to lengthy prison sentences stifled the activities of human rights activists and organizations (see Sections 1.d., 1.e., and 2.a.).

In February 2001, Human Rights Watch criticized the Government for restricting civil society groups from meeting. Human Rights Watch claimed that such groups had grown in popularity in the preceding months, but that on February 18, 2001 the Gov-

ernment informed many leaders of such groups that their meetings could not be held without government permission.
The Government has met only twice with international human rights organizations: Human Rights Watch in 1995 and Amnesty International in 1997.

As a matter of policy, the Government in its dealings with international groups denied that it commits human rights abuses. It has not permitted representatives of international organizations to visit prisons. The Government stated that it responds in writing to all inquiries from NGOs regarding human rights issues, including the cases of individual detainees and prisoners, through an interagency governmental committee established expressly for that purpose. The Government usually responds to queries from human rights organizations and foreign embassies regarding specific cases by claiming that the prisoner in question has violated national security laws.

Section 5 Discrimination Based on Race, Sex, Disability, Language, or Social Status

The Constitution provides for equal rights and equal opportunity for all citizens. However, in practice membership in the Ba'th Party or close familial relations with a prominent party member or powerful government official can be important for economic, social, or educational advancement. Party or government connections paved the way for entrance into

better elementary and secondary schools, access to lucrative employment, and greater power within the Government, the military, and the security services. Certain prominent positions, such as that of provincial governor, were reserved solely for Ba'th Party members. Apart from some discrimination against Jews and stateless Kurds, there were no apparent patterns of systematic government discrimination based on race, sex, disability, language, or social status. However, there were varying degrees of societal discrimination in each of these areas.

Women

Violence against women occurred, but there were no reliable statistics regarding the prevalence of domestic violence or sexual assault. The vast majority of cases likely were unreported, and victims generally were reluctant to seek assistance outside the family. Battered women have the legal right to seek redress in court, but few do so because of the social stigma attached to such action. The Syrian Women's Federation offers services to battered wives to remedy individual family problems. The Syrian Family Planning Association also attempts to deal with this problem. Some private groups, including the Family Planning Association, have organized seminars on violence against women, which were reported by the government press. There are a few private, nonofficial, specifically designated shelters or safe havens for battered women who seek to flee their husbands.

Rape is a felony; however, there are no laws against spousal rape.

Prostitution is prohibited by law, and it was not a widespread problem.

The law specifically provides for reduced sentences in "honor" crimes (violent assaults with intent to kill against a female by a male for alleged sexual misconduct). Instances of honor crimes were rare and occurred primarily in rural areas in which Bedouin customs prevail.

The law prohibits sexual harassment and specifies different punishments depending on whether the victim is a minor or an adult. Sexual harassment was rarely reported.

The Constitution provides for equality between men and women and equal pay for equal work. Moreover the Government has sought to overcome traditional discriminatory attitudes toward women and encourages women's education. However, the Government has not yet changed personal status, retirement, and social security laws that discriminate against women. In addition, some secular laws discriminate against women. For example, under criminal law, the punishment for adultery for a woman is twice that as for the same crime committed by a man.

Christians, Muslims, and other religious groups are subject to their respective religious laws on marriage, divorce, and inheritance. For Muslims, personal status law on divorce is based on Shari'a (Islamic law), and some of its provisions discriminate against women. For example, husbands may claim adultery as grounds for divorce, but wives face more difficulty in presenting the same argument. If a woman requests a divorce from her husband, she may not be entitled to child support in some instances. In addition, under the law a woman loses the right to custody of boys when they reach age 9 and girls at age 12.

Inheritance for Muslims also is based on Shari'a. Accordingly Muslim women usually are granted half of the inheritance share of male heirs. However, Shari'a mandates that male heirs provide financial support to the female relatives who inherit less. If they do not, females have the right to sue.

Polygyny is legal but is practiced only by a small minority of Muslim men.

A husband may request that his wife's travel abroad be prohibited (see Section 2.d.). Women generally are barred from travelling abroad with their children unless they are able to prove that the father has granted permission for the children to travel.

Women participated actively in public life and were represented in most professions, including the military. Women were not impeded from owning or managing land or other real property. Women constituted approximately 7 percent of judges, 10 percent of lawyers, 57 percent of teachers below university level, and 20 percent of university professors.

Children

There was no legal discrimination between boys and girls in education or in health care. The Government provides free, public education from primary school through university. Education is compulsory for all children, male or female, between the ages of 6 and 12. According to the Syrian Women's Union, approximately 46 percent of the total number of students through the secondary level are female. Nevertheless, societal pressure for early marriage and childbearing interferes with girls' educational progress, particularly in rural areas, in which the dropout rates for female students remained high.

The Government provides medical care for children until the age of 18.

Although there are cases of child abuse, there is no societal pattern of abuse against children. The law provides for severe penalties for those found guilty of the most serious abuses against children.

Child prostitution and trafficking in children are rare; incidents that arise mainly involve destitute orphans.

The law emphasizes the need to protect children, and the Government has organized seminars regarding the subject of child welfare.

Persons with Disabilities

The law prohibits discrimination against persons with disabilities and seeks to integrate them into the public sector work force. However, implementation is inconsistent. Regulations reserving four percent of government and public sector jobs for persons with disabilities are not implemented rigorously. Persons with disabilities may not legally challenge alleged instances of discrimination. There are no laws that mandate access to public buildings for persons with disabilities.

National/Racial/Ethnic Minorities

The Government generally permitted national and ethnic minorities to conduct traditional, religious, and cultural activities; however, the Government's attitude toward the Kurdish minority was a significant exception. Although the Government contends that there was no discrimination against the Kurdish population, it placed limits on the use and teaching of the Kurdish language. It also restricted the publication of books and other materials written in Kurdish (see Section 2.a.), Kurdish cultural expression,

and, at times, the celebration of Kurdish festivals. The Government tacitly accepted the importation and distribution of Kurdish language materials, particularly in the northeast region where most of the Kurds in the country reside. Some members of the Kurdish community have been tried by the Supreme State Security Court for expressing support for greater Kurdish autonomy or independence. Although the Government stopped the practice of stripping Kurds of their Syrian nationality (some 120,000 had lost Syrian nationality under this program in the 1960s), it never restored the nationality to those who lost it earlier. As a result, those who had lost their nationality, and their children, have been unable to obtain passports, or even identification cards and birth certificates. Without Syrian nationality, these stateless Kurds, who according to UNHCR estimates number approximately 200,000, are unable to own land, are not permitted to practice as doctors or engineers or be employed by the Government, are ineligible for admission to public hospitals, have no right to vote, and cannot travel to and from the country. They also encounter difficulties in enrolling their children in school, and in some cases, in registering their marriages.

In November 2000, a number of armed clashes occurred between Bedouin shepherds and Druze residents of Suwayda Province that required government military intervention to stop. Local press reported that between 15 and 20 Druze, Bedouin, and security

forces personnel were killed. There were large demonstrations following the deaths (see Sections 1.a. and 2.b.).

In August President Asad became the first president in 40 years to visit Hasakeh province in the northeast, where most Kurds reside. In meetings with regional and Kurdish leaders, he reportedly acknowledged the importance of Kurds to the local cultural heritage and stated his willingness to discuss citizenship problems.

Section 6 Worker Rights

a. The Right of Association

Although the Constitution provides for this right, workers were not free to establish unions independent of the Government. All unions must belong to the General Federation of Trade Unions (GFTU), which is dominated by the Ba'th Party and is in fact a part of the State's bureaucratic structure. The GFTU is an information channel between political decision-makers and workers. The GFTU transmits instructions downward to the unions and workers but also conveys information to decision-makers about worker conditions and needs. The GFTU advises the Government on legislation, organizes workers, and formulates rules for various member unions. The GFTU president is a senior member of the Ba'th Party. He and his deputy may attend cabinet meetings on eco-

nomic affairs. The GFTU controls nearly all aspects of union activity.

There were no reports of antiunion discrimination. Since the unions are part of the Government's bureaucratic structure, they are protected by law from antiunion discrimination.

The GFTU is affiliated with the International Confederation of Arab Trade Unions.

In 1992 the country's eligibility for tariff preferences under the U.S. Generalized System of Preferences was suspended because the Government failed to afford internationally recognized worker rights to workers.

b. The Right to Organize and Bargain Collectively

The right to organize and bargain collectively does not exist in any meaningful sense. Government representatives were part of the bargaining process in the public sector. In the public sector, unions did not normally bargain collectively on wage issues, but there was some evidence that union representatives participated with representatives of employers and the supervising ministry in establishing minimum wages, hours, and conditions of employment. Workers serve on the boards of directors of public enter-

prises, and union representatives always are included on the boards.

The law provides for collective bargaining in the private sector, although past repression by the Government dissuaded most workers from exercising this right.

Unions have the right to litigate disputes over work contracts and other workers' interests with employers and may ask for binding arbitration. In practice labor and management representatives settle most disputes without resort to legal remedies or arbitration. Management has the right to request arbitration, but that right seldom is exercised. Arbitration usually occurs when a worker initiates a dispute over wages or severance pay.

The law does not prohibit strikes; however, previous government crackdowns deterred workers from striking. In 1980 the security forces arrested many union and professional association officials who planned a national strike. Some of them are believed to remain in detention, either without trial or after being tried by the State Security Court (see Sections 1.d. and 2.b.). During the year, there were no strikes.

There are no unions in the seven free trade zones. Firms in the zones are exempt from the laws and regulations governing hiring and firing, although they must observe some provisions on health, safety, hours, and sick and annual leave.

c. Prohibition of Forced or Bonded Labor

There is no law prohibiting forced or bonded labor, including that performed by children. There were no reports of forced or bonded labor by children, or forced labor involving foreign workers or domestic servants. Forced labor has been imposed as a punishment for some convicted prisoners.

d. Status of Child Labor Practices and Minimum Age for Employment

The Labor Law provides for the protection of children from exploitation in the workplace; however, the Government tolerated child labor in some instances. Independent information and audits regarding government enforcement were not available. The compulsory age for schooling is 6 to 12 years of age; however, in 2000 the Parliament approved legislation that raised the private sector minimum age for employment from 12 to 15 years for most types of nonagricultural labor, and from 16 to 18 years for heavy work. Working hours for youths of legal age do not differ from those established for adults. In all cases, parental permission is required for children under the age of 16. The law prohibits children from working at night. However, the law applies only to children who work for a salary. Those who work in family businesses and who technically are not paid a salary--a common phenomenon--do not fall under the

law. Children under the age of 16 are prohibited by law from working in mines, at petroleum sites, or in other dangerous fields. Children are not allowed to lift, carry, or drag heavy objects. The exploitation of children for begging purposes also is prohibited. The Government claims that the expansion of the private sector has led to more young children working.

The Ministry of Labor and Social Affairs monitored employment conditions for persons under the age of 18, but it does not have enough inspectors to ensure compliance with the laws. The Ministry has the authority to specify the industries in which children 15 and 16 years of age may work.

The Labor Inspection Department performed unannounced spot checks of employers on a daily basis to enforce the law; however, the scope of these checks was unknown. The majority of children under age 16 who work did so for their parents in the agricultural sector without remuneration. The ILO reported in 1998 that 10.5 percent of children under the age of 18 participate in the labor force, which amounts to 4.7 percent of the total work force.

The law does not prohibit forced or bonded labor by children; however, such practices were not known to occur.

e. Acceptable Conditions of Work

The Minister of Labor and Social Affairs is responsible for enforcing minimum wage levels in the public and private sectors. In May the Government increased public sector minimum wages by 20 percent to $69 (3,175 Syrian pounds) per month, plus other compensation (for example, meals, uniforms, and transportation). In August the Government announced a 20 percent increase in private sector minimum wages. The gain in minimum wage levels was largely cancelled out by the increase in prices. These wages did not provide a decent standard of living for a worker and family. As a result, many workers in both the public and private sectors take additional jobs or are supported by their extended families.

The statutory workweek for administrative staff is 6 days of 6 hours each, and laborers work 6 days a week of 8 hours each. In some cases a 9-hour workday is permitted. The laws mandate one 24-hour rest day per week. Rules and regulations severely limit the ability of an employer to dismiss employees without cause. Even if a person is absent from work without notice for a long period, the employer must follow a lengthy procedure of trying to find the person and notify him, including through newspaper notices, before he is able to take any action against the employee. Dismissed employees have the right of appeal to a committee of representatives from the

union, management, the Ministry of Labor and Social Affairs, and the appropriate municipality. Such committees usually find in favor of the employee. Dismissed employees are entitled to 80 percent of salary benefits while the dispute is under consideration. No additional back wages are awarded should the employer be found at fault, nor are wage penalties imposed in cases in which the employer is not found at fault. The law does not protect temporary workers who are not subject to regulations on minimum wages. Small private firms and businesses employ such workers to avoid the costs associated with hiring permanent employees.

The law mandates safety in all sectors, and managers are expected to implement them fully. In practice there is little enforcement without worker complaints, which occur infrequently despite government efforts to post notices regarding safety rights and regulations. Large companies, such as oil field contractors, employ safety engineers.

The ILO noted in 1998 that a provision in the Labor Code allowing employers to keep workers at the workplace for as many as 11 hours a day might lead to abuse. However, there have been no reports of such abuses. Officials from the Ministries of Health and Labor are designated to inspect work sites for compliance with health and safety standards; however, such inspections appear to be sporadic, apart from those conducted in hotels and other facilities

that cater to foreigners. The enforcement of labor laws in rural areas also is more lax than in urban areas, where inspectors are concentrated. Workers may lodge complaints about health and safety conditions, with special committees established to adjudicate such cases. Workers have the right to remove themselves from hazardous conditions without risking loss of employment.

The law provides protection for foreign workers who reside legally in the country; but not for illegal workers. There were no credible estimates available on the number of illegal workers in the country.

f. Trafficking in Persons

There are no laws that specifically prohibit trafficking in persons; however, there were no reports that persons were systematically being trafficked to, from, or within the country. Standard labor laws could be applied in the event of allegations of trafficking. The Penal Code penalizes prostitution and trafficking of citizen women abroad.

EXHIBIT B

20th Anniversary of the National Endowment for Democracy
For Immediate Release
Office of the Press Secretary
November 6, 2003

President Bush Discusses Freedom in Iraq and Middle East
Remarks by the President at the 20th Anniversary of the National Endowment for Democracy
United States Chamber of Commerce
Washington, D.C.

THE PRESIDENT: Thank you all very much. Please be seated. Thanks for the warm welcome, and thanks for inviting me to join you in this 20th anniversary of the National Endowment for Democracy. The staff and directors of this organization have seen a lot of history over the last two decades, you've been a part of that history. By speaking for and standing for freedom, you've lifted the hopes of people around the world, and you've brought great credit to America.

I appreciate Vin for the short introduction. I'm a man who likes short introductions. And he didn't let me down. But more importantly, I appreciate the invitation. I appreciate the members of Congress who are here, senators from both political parties, members of the House of Representatives from both political parties. I appreciate the ambassadors who are here. I

appreciate the guests who have come. I appreciate the bipartisan spirit, the nonpartisan spirit of the National Endowment for Democracy. I'm glad that Republicans and Democrats and independents are working together to advance human liberty.

The roots of our democracy can be traced to England, and to its Parliament -- and so can the roots of this organization. In June of 1982, President Ronald Reagan spoke at Westminster Palace and declared, the turning point had arrived in history. He argued that Soviet communism had failed, precisely because it did not respect its own people -- their creativity, their genius and their rights.

President Reagan said that the day of Soviet tyranny was passing, that freedom had a momentum which would not be halted. He gave this organization its mandate: to add to the momentum of freedom across the world. Your mandate was important 20 years ago; it is equally important today. (Applause.)

A number of critics were dismissive of that speech by the President. According to one editorial of the time, "It seems hard to be a sophisticated European and also an admirer of Ronald Reagan." (Laughter.) Some observers on both sides of the Atlantic pronounced the speech simplistic and naive, and even dangerous. In fact, Ronald Reagan's words were courageous and optimistic and entirely correct. (Applause.)

The great democratic movement President Reagan described was already well underway. In the early 1970s, there were about 40 democracies in the world. By the middle of that decade, Portugal and Spain and Greece held free elections. Soon there were new democracies in Latin America, and free institutions were spreading in Korea, in Taiwan, and in East Asia. This very week in 1989, there were protests in East Berlin and in Leipzig. By the end of that year, every communist dictatorship in Central America* had collapsed. Within another year, the South African government released Nelson Mandela. Four years later, he was elected president of his country -- ascending, like Walesa and Havel, from prisoner of state to head of state.

As the 20th century ended, there were around 120 democracies in the world -- and I can assure you more are on the way. (Applause.) Ronald Reagan would be pleased, and he would not be surprised.
We've witnessed, in little over a generation, the swiftest advance of freedom in the 2,500 year story of democracy. Historians in the future will offer their own explanations for why this happened. Yet we already know some of the reasons they will cite. It is no accident that the rise of so many democracies took place in a time when the world's most influential nation was itself a democracy.

The United States made military and moral commitments in Europe and Asia, which protected free

nations from aggression, and created the conditions in which new democracies could flourish. As we provided security for whole nations, we also provided inspiration for oppressed peoples. In prison camps, in banned union meetings, in clandestine churches, men and women knew that the whole world was not sharing their own nightmare. They knew of at least one place -- a bright and hopeful land -- where freedom was valued and secure. And they prayed that America would not forget them, or forget the mission to promote liberty around the world.

Historians will note that in many nations, the advance of markets and free enterprise helped to create a middle class that was confident enough to demand their own rights. They will point to the role of technology in frustrating censorship and central control -- and marvel at the power of instant communications to spread the truth, the news, and courage across borders.

Historians in the future will reflect on an extraordinary, undeniable fact: Over time, free nations grow stronger and dictatorships grow weaker. In the middle of the 20th century, some imagined that the central planning and social regimentation were a shortcut to national strength. In fact, the prosperity, and social vitality and technological progress of a people are directly determined by extent of their liberty. Freedom honors and unleashes human creativity -- and creativity determines the strength and wealth of

nations. Liberty is both the plan of Heaven for humanity, and the best hope for progress here on Earth.

The progress of liberty is a powerful trend. Yet, we also know that liberty, if not defended, can be lost. The success of freedom is not determined by some dialectic of history. By definition, the success of freedom rests upon the choices and the courage of free peoples, and upon their willingness to sacrifice. In the trenches of World War I, through a two-front war in the 1940s, the difficult battles of Korea and Vietnam, and in missions of rescue and liberation on nearly every continent, Americans have amply displayed our willingness to sacrifice for liberty.

The sacrifices of Americans have not always been recognized or appreciated, yet they have been worthwhile. Because we and our allies were steadfast, Germany and Japan are democratic nations that no longer threaten the world. A global nuclear standoff with the Soviet Union ended peacefully -- as did the Soviet Union. The nations of Europe are moving towards unity, not dividing into armed camps and descending into genocide. Every nation has learned, or should have learned, an important lesson: Freedom is worth fighting for, dying for, and standing for -- and the advance of freedom leads to peace. (Applause.)

And now we must apply that lesson in our own time. We've reached another great turning point -- and the resolve we show will shape the next stage of the world democratic movement.

Our commitment to democracy is tested in countries like Cuba and Burma and North Korea and Zimbabwe -- outposts of oppression in our world. The people in these nations live in captivity, and fear and silence. Yet, these regimes cannot hold back freedom forever -- and, one day, from prison camps and prison cells, and from exile, the leaders of new democracies will arrive. (Applause.) Communism, and militarism and rule by the capricious and corrupt are the relics of a passing era. And we will stand with these oppressed peoples until the day of their freedom finally arrives. (Applause.)

Our commitment to democracy is tested in China. That nation now has a sliver, a fragment of liberty. Yet, China's people will eventually want their liberty pure and whole. China has discovered that economic freedom leads to national wealth. China's leaders will also discover that freedom is indivisible -- that social and religious freedom is also essential to national greatness and national dignity. Eventually, men and women who are allowed to control their own wealth will insist on controlling their own lives and their own country.

Our commitment to democracy is also tested in the Middle East, which is my focus today, and must be a focus of American policy for decades to come. In many nations of the Middle East -- countries of great strategic importance -- democracy has not yet taken root. And the questions arise: Are the peoples of the Middle East somehow beyond the reach of liberty? Are millions of men and women and children condemned by history or culture to live in despotism? Are they alone never to know freedom, and never even to have a choice in the matter? I, for one, do not believe it. I believe every person has the ability and the right to be free. (Applause.)

Some skeptics of democracy assert that the traditions of Islam are inhospitable to the representative government. This "cultural condescension," as Ronald Reagan termed it, has a long history. After the Japanese surrender in 1945, a so-called Japan expert asserted that democracy in that former empire would "never work." Another observer declared the prospects for democracy in post-Hitler Germany are, and I quote, "most uncertain at best" -- he made that claim in 1957. Seventy-four years ago, The Sunday London Times declared nine-tenths of the population of India to be "illiterates not caring a fig for politics." Yet when Indian democracy was imperiled in the 1970s, the Indian people showed their commitment to liberty in a national referendum that saved their form of government.

Time after time, observers have questioned whether this country, or that people, or this group, are "ready" for democracy -- as if freedom were a prize you win for meeting our own Western standards of progress. In fact, the daily work of democracy itself is the path of progress. It teaches cooperation, the free exchange of ideas, and the peaceful resolution of differences. As men and women are showing, from Bangladesh to Botswana, to Mongolia, it is the practice of democracy that makes a nation ready for democracy, and every nation can start on this path.

It should be clear to all that Islam -- the faith of one-fifth of humanity -- is consistent with democratic rule. Democratic progress is found in many predominantly Muslim countries -- in Turkey and Indonesia, and Senegal and Albania, Niger and Sierra Leone. Muslim men and women are good citizens of India and South Africa, of the nations of Western Europe, and of the United States of America.
More than half of all the Muslims in the world live in freedom under democratically constituted governments. They succeed in democratic societies, not in spite of their faith, but because of it. A religion that demands individual moral accountability, and encourages the encounter of the individual with God, is fully compatible with the rights and responsibilities of self-government.

Yet there's a great challenge today in the Middle East. In the words of a recent report by Arab schol-

ars, the global wave of democracy has -- and I quote -- "barely reached the Arab states." They continue: "This freedom deficit undermines human development and is one of the most painful manifestations of lagging political development." The freedom deficit they describe has terrible consequences, of the people of the Middle East and for the world. In many Middle Eastern countries, poverty is deep and it is spreading, women lack rights and are denied schooling. Whole societies remain stagnant while the world moves ahead. These are not the failures of a culture or a religion. These are the failures of political and economic doctrines.

As the colonial era passed away, the Middle East saw the establishment of many military dictatorships. Some rulers adopted the dogmas of socialism, seized total control of political parties and the media and universities. They allied themselves with the Soviet bloc and with international terrorism. Dictators in Iraq and Syria promised the restoration of national honor, a return to ancient glories. They've left instead a legacy of torture, oppression, misery, and ruin.

Other men, and groups of men, have gained influence in the Middle East and beyond through an ideology of theocratic terror. Behind their language of religion is the ambition for absolute political power. Ruling cabals like the Taliban show their version of religious piety in public whippings of women, ruth-

less suppression of any difference or dissent, and support for terrorists who arm and train to murder the innocent. The Taliban promised religious purity and national pride. Instead, by systematically destroying a proud and working society, they left behind suffering and starvation.

Many Middle Eastern governments now understand that military dictatorship and theocratic rule are a straight, smooth highway to nowhere. But some governments still cling to the old habits of central control. There are governments that still fear and repress independent thought and creativity, and private enterprise -- the human qualities that make for a -- strong and successful societies. Even when these nations have vast natural resources, they do not respect or develop their greatest resources -- the talent and energy of men and women working and living in freedom.

Instead of dwelling on past wrongs and blaming others, governments in the Middle East need to confront real problems, and serve the true interests of their nations. The good and capable people of the Middle East all deserve responsible leadership. For too long, many people in that region have been victims and subjects -- they deserve to be active citizens.

Governments across the Middle East and North Africa are beginning to see the need for change. Morocco has a diverse new parliament; King Moham-

med has urged it to extend the rights to women. Here is how His Majesty explained his reforms to parliament: "How can society achieve progress while women, who represent half the nation, see their rights violated and suffer as a result of injustice, violence, and marginalization, notwithstanding the dignity and justice granted to them by our glorious religion?" The King of Morocco is correct: The future of Muslim nations will be better for all with the full participation of women. (Applause.)

In Bahrain last year, citizens elected their own parliament for the first time in nearly three decades. Oman has extended the vote to all adult citizens; Qatar has a new constitution; Yemen has a multiparty political system; Kuwait has a directly elected national assembly; and Jordan held historic elections this summer. Recent surveys in Arab nations reveal broad support for political pluralism, the rule of law, and free speech. These are the stirrings of Middle Eastern democracy, and they carry the promise of greater change to come.

As changes come to the Middle Eastern region, those with power should ask themselves: Will they be remembered for resisting reform, or for leading it? In Iran, the demand for democracy is strong and broad, as we saw last month when thousands gathered to welcome home Shirin Ebadi, the winner of the Nobel Peace Prize. The regime in Teheran must heed the

democratic demands of the Iranian people, or lose its last claim to legitimacy. (Applause.)

For the Palestinian people, the only path to independence and dignity and progress is the path of democracy. (Applause.) And the Palestinian leaders who block and undermine democratic reform, and feed hatred and encourage violence are not leaders at all. They're the main obstacles to peace, and to the success of the Palestinian people.

The Saudi government is taking first steps toward reform, including a plan for gradual introduction of elections. By giving the Saudi people a greater role in their own society, the Saudi government can demonstrate true leadership in the region.

The great and proud nation of Egypt has shown the way toward peace in the Middle East, and now should show the way toward democracy in the Middle East. (Applause.) Champions of democracy in the region understand that democracy is not perfect, it is not the path to utopia, but it's the only path to national success and dignity.

As we watch and encourage reforms in the region, we are mindful that modernization is not the same as Westernization. Representative governments in the Middle East will reflect their own cultures. They will not, and should not, look like us. Democratic nations may be constitutional monarchies, federal republics,

or parliamentary systems. And working democracies always need time to develop -- as did our own. We've taken a 200-year journey toward inclusion and justice -- and this makes us patient and understanding as other nations are at different stages of this journey.

There are, however, essential principles common to every successful society, in every culture. Successful societies limit the power of the state and the power of the military -- so that governments respond to the will of the people, and not the will of an elite. Successful societies protect freedom with the consistent and impartial rule of law, instead of selecting applying -- selectively applying the law to punish political opponents. Successful societies allow room for healthy civic institutions -- for political parties and labor unions and independent newspapers and broadcast media. Successful societies guarantee religious liberty -- the right to serve and honor God without fear of persecution. Successful societies privatize their economies, and secure the rights of property. They prohibit and punish official corruption, and invest in the health and education of their people. They recognize the rights of women. And instead of directing hatred and resentment against others, successful societies appeal to the hopes of their own people. (Applause.)

These vital principles are being applied in the nations of Afghanistan and Iraq. With the steady lead-

ership of President Karzai, the people of Afghanistan are building a modern and peaceful government. Next month, 500 delegates will convene a national assembly in Kabul to approve a new Afghan constitution. The proposed draft would establish a bicameral parliament, set national elections next year, and recognize Afghanistan's Muslim identity, while protecting the rights of all citizens. Afghanistan faces continuing economic and security challenges -- it will face those challenges as a free and stable democracy. (Applause.)

In Iraq, the Coalition Provisional Authority and the Iraqi Governing Council are also working together to build a democracy -- and after three decades of tyranny, this work is not easy. The former dictator ruled by terror and treachery, and left deeply ingrained habits of fear and distrust. Remnants of his regime, joined by foreign terrorists, continue their battle against order and against civilization. Our coalition is responding to recent attacks with precision raids, guided by intelligence provided by the Iraqis, themselves. And we're working closely with Iraqi citizens as they prepare a constitution, as they move toward free elections and take increasing responsibility for their own affairs. As in the defense of Greece in 1947, and later in the Berlin Airlift, the strength and will of free peoples are now being tested before a watching world. And we will meet this test. (Applause.)

Securing democracy in Iraq is the work of many hands. American and coalition forces are sacrificing for the peace of Iraq and for the security of free nations. Aid workers from many countries are facing danger to help the Iraqi people. The National Endowment for Democracy is promoting women's rights, and training Iraqi journalists, and teaching the skills of political participation. Iraqis, themselves -- police and borders guards and local officials -- are joining in the work and they are sharing in the sacrifice.

This is a massive and difficult undertaking -- it is worth our effort, it is worth our sacrifice, because we know the stakes. The failure of Iraqi democracy would embolden terrorists around the world, increase dangers to the American people, and extinguish the hopes of millions in the region. Iraqi democracy will succeed -- and that success will send forth the news, from Damascus to Teheran -- that freedom can be the future of every nation. (Applause.) The establishment of a free Iraq at the heart of the Middle East will be a watershed event in the global democratic revolution. (Applause.)

Sixty years of Western nations excusing and accommodating the lack of freedom in the Middle East did nothing to make us safe -- because in the long run, stability cannot be purchased at the expense of liberty. As long as the Middle East remains a place where freedom does not flourish, it will remain a

place of stagnation, resentment, and violence ready for export. And with the spread of weapons that can bring catastrophic harm to our country and to our friends, it would be reckless to accept the status quo. (Applause.)

Therefore, the United States has adopted a new policy, a forward strategy of freedom in the Middle East. This strategy requires the same persistence and energy and idealism we have shown before. And it will yield the same results. As in Europe, as in Asia, as in every region of the world, the advance of freedom leads to peace. (Applause.)

The advance of freedom is the calling of our time; it is the calling of our country. From the Fourteen Points to the Four Freedoms, to the Speech at Westminster, America has put our power at the service of principle. We believe that liberty is the design of nature; we believe that liberty is the direction of history. We believe that human fulfillment and excellence come in the responsible exercise of liberty. And we believe that freedom -- the freedom we prize -- is not for us alone, it is the right and the capacity of all mankind. (Applause.)

Working for the spread of freedom can be hard. Yet, America has accomplished hard tasks before. Our nation is strong; we're strong of heart. And we're not alone. Freedom is finding allies in every country; freedom finds allies in every culture. And as we meet

the terror and violence of the world, we can be certain the author of freedom is not indifferent to the fate of freedom.

With all the tests and all the challenges of our age, this is, above all, the age of liberty. Each of you at this Endowment is fully engaged in the great cause of liberty. And I thank you. May God bless your work. And may God continue to bless America. (Applause.)

EXHIBIT C

U.S. Behind Secret Transfer of Terror Suspects

By Rajiv Chandrasekaran and Peter Finn
Washington Post Foreign Service
Monday, March 11, 2002; Page A01

JAKARTA, Indonesia, March 10 -- Arriving here from Pakistan in mid-November, Muhammad Saad Iqbal Madni told acquaintances that he had come to Indonesia to disburse an inheritance to his late father's second wife. But instead of writing a check and leaving, he settled into a small boarding house in a crowded, lower-middle-class neighborhood, where he visited the local mosque and spent hours on end watching television at a friend's house.

Stocky and bearded, Iqbal, 24, betrayed little about his life in Pakistan, except to hand out business cards identifying him as a Koran reader for an Islamic radio station. In early January, however, the CIA informed Indonesia's State Intelligence Agency that Iqbal had another occupation, according to Indonesian officials and foreign diplomats. Iqbal, they said, was an al Qaeda operative who had worked with Richard C. Reid, the Briton charged with trying to detonate explosives in his shoes on an American Airlines flight from Paris to Miami on Dec. 22.

The officials and diplomats said the CIA provided information about Iqbal's whereabouts and urged Indonesia to apprehend him. A few days later, the Egyptian government formally asked Indonesia to extradite Iqbal, who carried an Egyptian as well as a Pakistani passport, a senior Indonesian official said. The Egyptian request alleged Iqbal was wanted in connection with terrorism, he said. It did not specify the crime, he said, but Indonesian officials were told the charges were unrelated to the Reid case.

By Jan. 9, Iqbal was in the hands of Indonesian intelligence agents. Two days later -- without a court hearing or a lawyer -- he was hustled aboard an unmarked, U.S.-registered Gulfstream V jet parked at a military airport in Jakarta and flown to Egypt, the Indonesian officials said.

Since Sept. 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics -- including torture and threats to families -- that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogation, the sources said.

"After September 11, these sorts of movements have been occurring all the time," a U.S. diplomat said. "It allows us to get information from terrorists in a way we can't do on U.S. soil."

U.S. officials would not comment on evidence linking Iqbal to Reid, but Western diplomats in Jakarta said Iqbal's name appeared on al Qaeda documents discovered by U.S. intelligence agents in Afghanistan. Indonesian officials said U.S. officials did not detail Iqbal's alleged involvement with terrorism other than to say he was connected to Reid, and as a consequence, he was highly sought by the U.S. government.

Iqbal remains in custody in Egypt, intelligence sources said. The sources said he has been questioned by U.S. agents but there was no word on his legal status, a situation that resembles that of other Islamic activists taken into custody in cooperation with the CIA.

In October, for instance, a Yemeni microbiology student wanted in connection with the bombing of the USS Cole was flown from Pakistan to Jordan on a U.S.-registered Gulfstream jet after Pakistan's intelligence agency surrendered him to U.S. authorities at the Karachi airport, Pakistani government sources said. The hand-over of the shackled and blindfolded student, Jamil Qasim Saeed Mohammed, who was alleged to be an al Qaeda operative, oc-

curred in the middle of the night at a remote corner of the airport without extradition or deportation procedures, the sources said.

U.S. forces seized five Algerians and a Yemeni in Bosnia on Jan. 19 and flew them to a detention camp at the U.S. naval base at Guantanamo Bay, Cuba, after they were ordered released by the Bosnian Supreme Court for lack of evidence -- and despite an injunction from the Bosnian Human Rights Chamber that four of them be allowed to remain in the country pending further proceedings. The Human Rights Chamber, created under the U.S.-brokered Dayton peace accords that ended the 1992-95 war, was designed to protect human rights and due process.

U.S. involvement in seizing terrorism suspects in third countries and shipping them with few or no legal proceedings to the United States or other countries -- known as "rendition" -- is not new. In recent years, U.S. agents, working with Egyptian intelligence and local authorities in Africa, Central Asia and the Balkans, have sent dozens of suspected Islamic extremists to Cairo or taken them to the United States, according to U.S. officials, Egyptian lawyers and human rights groups. U.S. authorities are urging Pakistan to take the same step with the chief suspect in the kidnapping and killing of Wall Street Journal reporter Daniel Pearl.

In 1998, U.S. agents spirited Talaat Fouad Qassem, 38, a reputed leader of the Islamic Group, an Egyptian extremist organization, to Egypt after he was picked up in Croatia while traveling to Bosnia from Denmark, where he had been granted political asylum. Qassem was allegedly an associate of Ayman Zawahiri, the number-two man in Osama bin Laden's al Qaeda network. Egyptian lawyers said he was questioned aboard a U.S. ship off the Croatian coast before being taken to Cairo, where a military tribunal had already sentenced him to death in absentia. Egyptian officials have refused to discuss his case.

U.S. intelligence officers are also believed to have participated in the 1998 seizure in Azerbaijan of three members of Egypt's other main underground group, Egyptian Islamic Jihad, according to testimony provided to their attorneys in Cairo.

Also in 1998, CIA officers working with Albanian police seized five members of Egyptian Islamic Jihad who were allegedly planning to bomb the U.S. Embassy in Tirana, Albania's capital.

After three days of interrogation, the five men were flown to Egypt aboard a plane that was chartered by the CIA; two were put to death. The five were among 13 suspects known to have been picked up in the Balkans with U.S. involvement and taken to Egypt for trial.

Between 1993 and 1999, terrorism suspects also were rendered to the United States from Nigeria, the Philippines, Kenya and South Africa in operations acknowledged by U.S. officials. Dozens of other covert renditions, often with Egyptian cooperation, were also conducted, U.S. officials said. The details of most of these operations, which often ignored local and international extradition laws, remain closely guarded.

Even when local intelligence agents are involved, diplomats said it is preferable to render a suspect secretly because it prevents lengthy court battles and minimizes publicity that could tip off the detainee's associates. Rendering suspects to a third country, particularly Muslim nations such as Egypt or Jordan, also helps to defuse domestic political concerns in predominantly Muslim nations such as Indonesia, the diplomats said.

Sending a suspect directly to the United States, the diplomats said, could prompt objections from government officials who fear that any publicity of such an action would lead to a backlash from fundamentalist Islamic groups.

In Iqbal's case, Indonesian government officials told local media that he had been sent to Egypt because of visa violations. A spokesman for the immigration department said Iqbal failed to identify a sponsor for

his visit to Indonesia on his visa application form, which was submitted in Islamabad, Pakistan.

A senior Indonesian government official said disclosing the U.S. role would have exposed President Megawati Sukarnoputri to criticism from Muslim-oriented political parties in her governing coalition. "We can't be seen to be cooperating too closely with the United States," the official said.

The official said an extradition request from Egypt and the discovery of Iqbal's visa infraction provided political cover to comply with the CIA's request. "This was a U.S. deal all along," the senior official said. "Egypt just provided the formalities."

Indonesian officials believe Iqbal, who arrived in Jakarta on Nov. 17, came to the vast Southeast Asian archipelago not to plan an attack but to seek refuge as the Taliban neared collapse and al Qaeda leaders sought to flee Afghanistan. Western officials said they do not have a full picture of what Iqbal was doing in Indonesia and they cannot rule out the possibility that he was engaged in terrorist activities here.

Iqbal had lived in Jakarta as a teenager while his father, who also was an expert Koran reader, taught at the Arab Language Institute. Shortly after Iqbal arrived in November, he returned to his old neighborhood, a district in east Jakarta with narrow, winding streets and open sewers. There he met up

with one of his father's former students, Mohammed Rizard, who helped him get a room at a nearby boarding house.

Rizard, a printer, said Iqbal often would spend afternoons at his house, watching television and singing Indian karaoke tunes. Although Iqbal said he came to Indonesia to distribute an inheritance to his father's second wife, he appeared to be in no hurry to perform the task, Rizard said.

"He was taking it easy," Rizard said. "He was more interested in talking about girls and singing karaoke."

Just before his arrest, Iqbal visited Solo, a city in central Java, Indonesia's main island, saying he was going to see his stepmother. The city is regarded by Western and Asian intelligence officials as a base for Jemaah Islamiah, a militant Muslim group with bases in Indonesia, Singapore and Malaysia that is alleged to be affiliated with al Qaeda. The group is accused of plotting to blow up Western embassies and U.S. naval vessels in Singapore and of aiding two of the Sept. 11 hijackers during a trip they made to Malaysia in 2000.

Rizard said he never discussed politics with Iqbal or inquired about his life in Pakistan. "He never talked about jihad or America," Rizard said. Rizard also

said he rifled through Iqbal's suitcase and "found nothing suspicious."

In December, Iqbal sent several letters to friends in Pakistan, Rizard said. Three replies arrived at Rizard's house, which Iqbal used as a return address, after he had been seized and sent to Egypt. Rizard gave the unopened letters to correspondents for The Washington Post and the Weekend Australian newspaper.

The handwritten letters, in the Urdu language, contain no incriminating details but do suggest that Iqbal's missives had expressed deep frustration and despair.

"Why have you lost all hope?" one of his friends, Hafiz Mohammad Riazuddin, wrote. "Please keep your head and spirits up."

"Surprisingly you have asked about the Taliban," Riazuddin continued. "How did you become interested in politics? Anyway, by the time you sent this letter, Taliban rule has ended in Afghanistan. U.S. and British troops have landed in Afghanistan. The U.S. has taken bases in Pakistan and Pakistan's nuclear program is in danger."

A lengthy letter from a woman who appears to be his girlfriend suggested Iqbal had left Pakistan suddenly and had not told those close to him where he was

going. "It gives great pleasure to know that you are alive," she wrote.

Another letter, from a man named Shahid, refers to plans to visit an "uncle in America" and talk to an "Uncle Babar" in Malaysia.

Despite criticism from some U.S. officials as well as from neighboring Singapore and Malaysia that Indonesia is not moving aggressively enough against suspected terrorists, particularly members of Jemaah Islamiah, officials here quickly point to Iqbal's rendition as proof they are cooperating, albeit quietly, in the global fight against terrorism.

"The CIA asked us to find this guy and hand him over," the senior Indonesian official said. "We did what they wanted."

Finn reported from Berlin. Correspondent Howard Schneider in Cairo, special correspondent Kamran Khan in Karachi, Pakistan, and staff writers Dan Eggen and Walter Pincus in Washington contributed to this report.

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U.S. Decries Abuse but Defends Interrogations
'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities

By Dana Priest and Barton Gellman
Washington Post Staff Writers
Thursday, December 26, 2002

Deep inside the forbidden zone at the U.S.-occupied Bagram air base in Afghanistan, around the corner from the detention center and beyond the segregated clandestine military units, sits a cluster of metal shipping containers protected by a triple layer of concertina wire. The containers hold the most valuable prizes in the war on terrorism -- captured al Qaeda operatives and Taliban commanders.

Those who refuse to cooperate inside this secret CIA interrogation center are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights -- subject to what are known as "stress and duress" techniques.

Those who cooperate are rewarded with creature comforts, interrogators whose methods include feigned friendship, respect, cultural sensitivity and, in some cases, money. Some who do not cooperate are turned over -- "rendered," in official parlance -- to foreign intelligence services whose practice of torture

has been documented by the U.S. government and human rights organizations.

In the multifaceted global war on terrorism waged by the Bush administration, one of the most opaque -- yet vital -- fronts is the detention and interrogation of terrorism suspects. U.S. officials have said little publicly about the captives' names, numbers or whereabouts, and virtually nothing about interrogation methods. But interviews with several former intelligence officials and 10 current U.S. national security officials -- including several people who witnessed the handling of prisoners -- provide insight into how the U.S. government is prosecuting this part of the war.

The picture that emerges is of a brass-knuckled quest for information, often in concert with allies of dubious human rights reputation, in which the traditional lines between right and wrong, legal and inhumane, are evolving and blurred.

While the U.S. government publicly denounces the use of torture, each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary. They expressed confidence that the American public would back their view. The CIA, which has primary responsibility for interrogations, declined to comment.

"If you don't violate someone's human rights some of the time, you probably aren't doing your job," said one official who has supervised the capture and transfer of accused terrorists. "I don't think we want to be promoting a view of zero tolerance on this. That was the whole problem for a long time with the CIA.."

The off-limits patch of ground at Bagram is one of a number of secret detention centers overseas where U.S. due process does not apply, according to several U.S. and European national security officials, where the CIA undertakes or manages the interrogation of suspected terrorists. Another is Diego Garcia, a somewhat horseshoe-shaped island in the Indian Ocean that the United States leases from Britain.

U.S. officials oversee most of the interrogations, especially those of the most senior captives. In some cases, highly trained CIA officers question captives through interpreters. In others, the intelligence agency undertakes a "false flag" operation using fake decor and disguises meant to deceive a captive into thinking he is imprisoned in a country with a reputation for brutality, when, in reality, he is still in CIA hands. Sometimes, female officers conduct interrogations, a psychologically jarring experience for men reared in a conservative Muslim culture where women are never in control.

In other cases, usually involving lower-level captives, the CIA hands them to foreign intelligence services -- notably those of Jordan, Egypt and Morocco -- with a list of questions the agency wants answered. These "extraordinary renditions" are done without resort to legal process and usually involve countries with security services known for using brutal means.

According to U.S. officials, nearly 3,000 suspected al Qaeda members and their supporters have been detained worldwide since Sept. 11, 2001. About 625 are at the U.S. military's confinement facility at Guantanamo Bay, Cuba. Some officials estimated that fewer than 100 captives have been rendered to third countries. Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said.

At a Sept. 26 joint hearing of the House and Senate intelligence committees, Cofer Black, then head of the CIA Counterterrorist Center, spoke cryptically about the agency's new forms of "operational flexibility" in dealing with suspected terrorists. "This is a very highly classified area, but I have to say that all you need to know: There was a before 9/11, and there was an after 9/11," Black said. "After 9/11 the gloves come off."

According to one official who has been directly involved in rendering captives into foreign hands, the understanding is, "We don't kick the [expletive] out

of them. We send them to other countries so they can kick the [expletive] out of them." Some countries are known to use mind-altering drugs such as sodium pentathol, said other officials involved in the process.

Abu Zubaida, who is believed to be the most important al Qaeda member in detention, was shot in the groin during his apprehension in Pakistan in March. National security officials suggested that Zubaida's painkillers were used selectively in the beginning of his captivity. He is now said to be cooperating, and his information has led to the apprehension of other al Qaeda members.

U.S. National Security Council spokesman Sean McCormack declined to comment earlier this week on CIA or intelligence-related matters. But, he said: "The United States is treating enemy combatants in U.S. government control, wherever held, humanely and in a manner consistent with the principles of the Third Geneva Convention of 1949."

The convention outlined the standards for treatment of prisoners of war. Suspected terrorists in CIA hands have not been accorded POW status.

Other U.S. government officials, speaking on condition of anonymity, acknowledged that interrogators deprive some captives of sleep, a practice with ambiguous status in international law.

The U.N. High Commissioner for Human Rights, the authoritative interpreter of the international Convention Against Torture, has ruled that lengthy interrogation may incidentally and legitimately cost a prisoner sleep. But when employed for the purpose of breaking a prisoner's will, sleep deprivation "may in some cases constitute torture."

The State Department's annual human rights report routinely denounces sleep deprivation as an interrogation method. In its 2001 report on Turkey, Israel and Jordan, all U.S. allies, the department listed sleep deprivation among often-used alleged torture techniques.

U.S. officials who defend the renditions say the prisoners are sent to these third countries not because of their coercive questioning techniques, but because of their cultural affinity with the captives. Besides being illegal, they said, torture produces unreliable information from people who are desperate to stop the pain. They look to foreign allies more because their intelligence services can develop a culture of intimacy that Americans cannot. They may use interrogators who speak the captive's Arabic dialect and often use the prospects of shame and the reputation of the captive's family to goad the captive into talking.

In a speech on Dec. 11, CIA director George J. Tenet said that interrogations overseas have yielded sig-

nificant returns recently. He calculated that worldwide efforts to capture or kill terrorists had eliminated about one-third of the al Qaeda leadership. "Almost half of our successes against senior al Qaeda members has come in recent months," he said.

Many of these successes have come as a result of information gained during interrogations. The capture of al Qaeda leaders Ramzi Binalshibh in Pakistan, Omar al-Faruq in Indonesia, Abd al-Rahim al-Nashiri in Kuwait and Muhammad al Darbi in Yemen were all partly the result of information gained during interrogations, according to U.S. intelligence and national security officials. All four remain under CIA control.

Time, rather than technique, has produced the most helpful information, several national security and intelligence officials said. Using its global computer database, the CIA is able to quickly check leads from captives in one country with information divulged by captives in another.

"We know so much more about them now than we did a year ago -- the personalities, how the networks are established, what they think are important targets, how they think we will react," said retired Army general Wayne Downing, the Bush administration's deputy national security adviser for combating terrorism until he resigned in June.

"The interrogations of Abu Zubaida drove me nuts at times," Downing said. "He and some of the others are very clever guys. At times I felt we were in a classic counter-interrogation class: They were telling us what they think we already knew. Then, what they thought we wanted to know. As they did that, they fabricated and weaved in threads that went nowhere. But, even with these ploys, we still get valuable information and they are off the street, unable to plot and coordinate future attacks."

In contrast to the detention center at Guantanamo Bay, where military lawyers, news reporters and the Red Cross received occasional access to monitor prisoner conditions and treatment, the CIA's overseas interrogation facilities are off-limits to outsiders, and often even to other government agencies. In addition to Bagram and Diego Garcia, the CIA has other secret detention centers overseas, and often uses the facilities of foreign intelligence services.

Free from the scrutiny of military lawyers steeped in the international laws of war, the CIA and its intelligence service allies have the leeway to exert physically and psychologically aggressive techniques, said national security officials and U.S. and European intelligence officers.

Although no direct evidence of mistreatment of prisoners in U.S. custody has come to light, the prisoners are denied access to lawyers or organizations, such

as the Red Cross, that could independently assess their treatment. Even their names are secret.

This month, the U.S. military announced that it had begun a criminal investigation into the handling of two prisoners who died in U.S. custody at the Bagram base. A base spokesman said autopsies found one of the detainees died of a pulmonary embolism, the other of a heart attack.

Al Qaeda suspects are seldom taken without force, and some suspects have been wounded during their capture. After apprehending suspects, U.S. takedown teams -- a mix of military special forces, FBI agents, CIA case officers and local allies -- aim to disorient and intimidate them on the way to detention facilities.

According to Americans with direct knowledge and others who have witnessed the treatment, captives are often "softened up" by MPs and U.S. Army Special Forces troops who beat them up and confine them in tiny rooms. The alleged terrorists are commonly blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep. The tone of intimidation and fear is the beginning, they said, of a process of piercing a prisoner's resistance.

The take-down teams often "package" prisoners for transport, fitting them with hoods and gags, and binding them to stretchers with duct tape.

Bush administration appointees and career national security officials acknowledged that, as one of them put it, "our guys may kick them around a little bit in the adrenaline of the immediate aftermath." Another said U.S. personnel are scrupulous in providing medical care to captives, adding in a deadpan voice, that "pain control in wounded patients is a very subjective thing."

The CIA's participation in the interrogation of rendered terrorist suspects varies from country to country.

"In some cases involving interrogations in Saudi Arabia we're able to observe through one-way mirrors the live investigations," said a senior U.S. official involved in Middle East security issues. "In others, we usually get summaries. We will feed questions to their investigators. They're still very much in control."

The official added: "We're not aware of any torture or even physical abuse."

Tenet acknowledged the Saudis' role in his Dec. 11 speech. "The Saudis are proving increasingly important support to our counterterrorism efforts -- from

making arrests to sharing debriefing results," he said.

But Saudi Arabia is also said to withhold information that might lead the U.S. government to conclusions or policies that the Saudi royal family fears. U.S. teams, for that reason, have sometimes sent Saudi nationals to Egypt instead.

Jordan is a favored country for renditions, several U.S. officials said. The Jordanians are considered "highly professional" interrogators, which some officials said meant that they do not use torture. But the State Department's 2001 human rights report criticized Jordan and its General Intelligence Directorate for arbitrary and unlawful detentions and abuse.

"The most frequently alleged methods of torture include sleep deprivation, beatings on the soles of the feet, prolonged suspension with ropes in contorted positions and extended solitary confinement," the 2001 report noted. Jordan also is known to use prisoners' family members to induce suspects to talk.

Another significant destination for rendered suspects is Morocco, whose general intelligence service has sharply stepped up cooperation with the United States. Morocco has a documented history of torture, as well as longstanding ties to the CIA.

The State Department's human rights report says Moroccan law "prohibits torture, and the government claims that the use of torture has been discontinued; however, some members of the security forces still tortured or otherwise abused detainees."

In at least one case, U.S. operatives led the capture and transfer of an al Qaeda suspect to Syria, which for years has been near the top of U.S. lists of human rights violators and sponsors of terrorism. The German government strongly protested the move. The suspect, Mohammed Haydar Zammar, holds joint German and Syrian citizenship. It could not be learned how much of Zammar's interrogation record Syria has provided the CIA.

The Bush administration maintains a legal distance from any mistreatment that occurs overseas, officials said, by denying that torture is the intended result of its rendition policy. American teams, officials said, do no more than assist in the transfer of suspects who are wanted on criminal charges by friendly countries. But five officials acknowledged, as one of them put it, "that sometimes a friendly country can be invited to 'want' someone we grab." Then, other officials said, the foreign government will charge him with a crime of some sort.

One official who has had direct involvement in renditions said he knew they were likely to be tortured. "I . . . do it with my eyes open," he said.

According to present and former officials with first-hand knowledge, the CIA's authoritative Directorate of Operations instructions, drafted in cooperation with the general counsel, tells case officers in the field that they may not engage in, provide advice about or encourage the use of torture by cooperating intelligence services from other countries.

"Based largely on the Central American human rights experience," said Fred Hitz, former CIA inspector general, "we don't do torture, and we can't countenance torture in terms of we can't know of it." But if a country offers information gleaned from interrogations, "we can use the fruits of it."

Bush administration officials said the CIA, in practice, is using a narrow definition of what counts as "knowing" that a suspect has been tortured. "If we're not there in the room, who is to say?" said one official conversant with recent reports of renditions.

The Clinton administration pioneered the use of extraordinary rendition after the bombings of U.S. embassies in Kenya and Tanzania in 1998. But it also pressed allied intelligence services to respect lawful boundaries in interrogations.

After years of fruitless talks in Egypt, President Bill Clinton cut off funding and cooperation with the directorate of Egypt's general intelligence service,

whose torture of suspects has been a perennial theme in State Department human rights reports.

"You can be sure," one Bush administration official said, "that we are not spending a lot of time on that now."

Staff writers Bob Woodward, Susan Schmidt and Douglas Farah, and correspondent Peter Finn in Berlin, contributed to this report.

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Key to U.S. Case Denies Iraq-Al Qaeda Link
By Sebastian Rotella Los Angeles Times Staff Writer

February 1 2003
LA Times
http://www.latimes.com/la-fg-mullah1feb01,0,3525790.story

BRUSSELS -- The strangest thing about the strange story of Mullah Krekar, the leader of an Islamic terrorist group operating in the wilds of northern Iraq, is the fact that he remains a free man, living in peaceful Norway.

Krekar, who U.S. leaders charge could be proof of Al Qaeda's alleged links to Saddam Hussein, said Friday that he would be upset but not surprised if Secretary of State Colin L. Powell names him next week during a much-anticipated U.N. presentation of the case against Iraq.

"I can say to you that this is not true that I am a link between Saddam Hussein and Al Qaeda," Krekar, 47, said during a telephone interview from Oslo, the Norwegian capital. "I will wait until Wednesday, and if Powell says anything against me, I can use documents to prove it is not true. Everything: that we have chemical bombs, [ties to] Osama bin Laden, Saddam Hussein, all of those things."

Although some counter-terrorism officials in the U.S.

and Europe doubt that connections between Al Qaeda and the Iraqi president exist, U.S. authorities call Krekar a dangerous man. Moreover, Jordan wants to extradite him on drug trafficking charges. The Dutch locked him up for four months, then deported him to Norway, where he has refugee status. Norwegian police have spent days questioning him about alleged asylum fraud and terror activity related to his leadership of Ansar al-Islam, an armed Kurdish group.

"The U.S. has an interest in making sure people associated with terrorism can't facilitate terrorist acts," said a spokesman at the U.S. Embassy in Oslo. "We believe he is linked to terrorism generally and Al Qaeda specifically. We hope Norway will take some action regarding him."

Although the FBI has interviewed Krekar twice, U.S. officials acknowledge that they are not able to charge him with a crime or to request his extradition. The Norwegians and the Dutch say they don't have enough evidence to hold him.

That is the best defense, Krekar declares triumphantly, against anyone using him to argue that a war on Iraq would also be a war on terrorism. He challenges the Bush administration to grant him a visa so he can plead his case.

"I said to the FBI, 'I can come to America and prove

it's not true in your court,' " said Krekar, who studied Islamic theology with a founder of Al Qaeda and has publicly praised Bin Laden."I am not an enemy of America. Not Powell, but Rumsfeld and Wolfowitz want to push George Bush to war," he added, referring to Defense Secretary Donald H. Rumsfeld and Deputy Defense Secretary Paul D. Wolfowitz.

Rhetoric aside, Krekar is not the only notorious Islamic leader to elude arrest in Europe despite plenty of suspicion and effort in a number of countries. As his case shows, the global nature of Islamic extremism often combines with Europe's patchwork of conflicting justice systems and immigration policies to frustrate counter-terrorism investigators.

The debate about Iraq has thrown a divisive new element into the mix: the high-stakes politics of a world on the edge of war. Krekar accuses the United States of leaning on smaller countries to do its dirty work.

"I told the Norwegians, 'Don't let America touch me with your hand,' " Krekar said.

Krekar's odyssey has been confused and occasionally goofy. To the dismay of U.S. officials, the Dutch deported him last month thinking that Norwegian police would arrest him on the spot, according to knowledgeable officials. But nobody met the Dutch

police who walked Krekar off the plane Jan. 13; Norwegian police saw no reason to arrest him.

The mullah walked free.

Krekar's real name is Faraj Ahmad. The shaggy, bearded cleric claims to be the author of 30 books, including volumes of poetry, and says he became the leader of Ansar al-Islam in December 2001. Officials in Kurd-controlled northern Iraq call him a vicious terrorist whose Islamic marauders have imposed Taliban-style living conditions in the area they control and massacred Kurdish rivals.

Last year, Krekar traveled from Amsterdam, where he has relatives, to Iran. Authorities there arrested him and expelled him to the Netherlands. Dutch prosecutors held him based on a Jordanian extradition request for heroin trafficking, a charge he denies.

Shortly after the arrest, U.S. Atty. Gen. John Ashcroft expressed great interest in the case during a meeting with Dutch Justice Minister Piet Donner, according to Donner. Jordan has no extradition treaty with the Netherlands, but two countries may extradite drug suspects under a U.N. treaty.

Krekar's lawyers say they suspect that the U.S. and Jordan orchestrated the drug case in the hope that Krekar would end up in the hands of Jordanian in-

telligence agents. As part of a practice known as "rendering," the U.S. has steered suspected terrorists to Middle Eastern allies whose security services have reputations for harsh interrogation techniques.

"We suspected drugs was a cover-up," said Britta Bohler, a Dutch lawyer. "It's very strange. Maybe the U.S. government had an interest that Jordan interrogate him more."

FBI agents interviewed Krekar twice in Dutch custody. The agents asked about his activity in Iraq, Al Qaeda and Saddam Hussein, according to Krekar and his lawyers, but did not give the impression they were investigating a specific case.

U.S. officials did not comment on the interviews. They said there is no public indictment of Krekar. Asked if he was under investigation, a U.S. official said: "There is a lot of interest in him."

Krekar denies allegations of involvement with Al Qaeda figures such as Abu Musab Zarqawi, a chemical warfare expert whom investigators suspect was the mastermind of attack plots by an Algerian network in Britain and France. But U.S., Kurdish and European officials say Ansar's ties to Al Qaeda appear well documented.

Clear ties to Hussein seem more elusive. U.S. and Kurdish officials point to Abu Wael, a fellow leader of

Ansar accused of being an Iraqi intelligence liaison to the Islamic terrorists. Krekar claims that Iraqi agents tried to poison him in 1992 and would kill him if they could.

"Our aim has always been the toppling of the Iraqi Baath regime," he said. But he said he opposes a U.S. attack on Iraq because "Saddam attaches no importance to humanitarian values, and if he is cornered and realizes that he is going to be hit, he will sink the boat with everyone and everything in it."

As the international debate about Iraq mounted, Krekar's case became increasingly uncomfortable for Dutch authorities. Ten days before his scheduled extradition hearing, authorities decided to deport him to Norway, where his wife and four children live.

His lawyers assert that the Jordanian case was weak and that the Dutch government wanted to avoid another terrorism-related embarrassment. Late last year, a Dutch court acquitted accused members of an alleged Al Qaeda cell who prosecutors charged had plotted to bomb the U.S. Embassy in Paris.

Today, Krekar's Norwegian lawyer fears that Norway wants to strip the mullah of his refugee passport, leaving him stateless. The obstacle to a terrorism case in Oslo, however, is a law that says he must be a threat to Norway to be charged. "His fight is

against other Kurds," said the lawyer, Brynjar Meling. "That charge is hopeless."

Krekar sees himself as a pawn of the U.S. government. "This is only for a war against Iraq," he said. "Our group didn't do anything against America.

DEPORTED TERROR SUSPECT DETAILS TORTURE IN SYRIA

Canadian's Case Called Typical of CIA

November 5, 2003; Page A01

By DeNeen L. Brown and Dana Priest, Washington Post Staff Writers

TORONTO, Nov. 4 -- A Canadian citizen who was detained last year at John F. Kennedy International Airport in New York as a suspected terrorist said Tuesday he was secretly deported to Syria and endured 10 months of torture in a Syrian prison.

Maher Arar, 33, who was released last month, said at a news conference in Ottawa that he pleaded with U.S. authorities to let him continue on to Canada, where he has lived for 15 years and has a family. But instead, he was flown under U.S. guard to Jordan and handed over to Syria, where he was born. Arar denied any connection to terrorism and said he would fight to clear his name.

U.S. officials said Tuesday that Arar was deported because he had been put on a terrorist watch list after information from "multiple international intelligence agencies" linked him to terrorist groups.

Officials, speaking on condition of anonymity, said that the Arar case fits the profile of a covert CIA "extraordinary rendition" -- the practice of turning over low-level, suspected terrorists to foreign intelligence

services, some of which are known to torture prisoners.

Arar's case has brought repeated apologies from the Canadian government, which says it is investigating what information the Royal Canadian Mounted Police gave to U.S. authorities. Canada's foreign minister, Bill Graham, also said he would question the Syrian ambassador about Arar's statements about torture. In an interview on CBC Radio, Imad Moustafa, the Syrian chargé d'affaires in Washington, denied that Arar had been tortured.

Arar said U.S. officials apparently based the terrorism accusation on his connection to Abdullah Almalki, another Syrian-born Canadian. Almalki is being detained by Syrian authorities, although no charges against him have been reported. Arar said he knew Almalki only casually before his detention but encountered him at the Syrian prison where both were tortured.

Arar, whose case has become a cause celebre in Canada, demanded a public inquiry. "I am not a terrorist," he said. "I am not a member of al Qaeda. I have never been to Afghanistan."

He said he was flying home to Montreal via New York on Sept. 26, 2002, from a family visit to Tunisia.

"This is when my nightmare began," he said. "I was pulled aside by immigration and taken [away]. The police came and searched my bags. I asked to make a phone call and they would not let me." He said an FBI agent and a New York City police officer questioned him. "I was so scared," he said. "They told me I had no right to a lawyer because I was not an American citizen."

Arar said he was shackled, placed on a small jet and flown to Washington, where "a new team of people got on the plane" and took him to Amman, the capital of Jordan. Arar said U.S. officials handed him over to Jordanian authorities, who "blindfolded and chained me and put me in a van. . . . They made me bend my head down in the back seat. Then these men started beating me. Every time I tried to talk, they beat me."

Hours later, he said, he was taken to Syria and there he was forced to write that he had been to a training camp in Afghanistan. "They kept beating me, and I had to falsely confess," he said. "I was willing to confess to anything to stop the torture."

Arar said his prison cell "was like a grave, exactly like a grave. It had no light, it was three feet wide, it was six feet deep, it was seven feet high. . . It had a metal door. There was a small opening in the ceiling. There were cats and rats up there, and from time to

time, the cats peed through the opening into the cell."

Steven Watt, a human rights fellow at the Center for Constitutional Rights in Washington, said Arar's case raised questions about U.S. counterterrorism measures. "Here we have the United States involved in the removal of somebody to a country where it knows persons in custody of security agents are tortured," Watt said. "The U.S. was possibly benefiting from the fruits of that torture. I ask the question: Why wasn't he removed to Canada?"

A senior U.S. intelligence official discussed the case in terms of the secret rendition policy. There have been "a lot of rendition activities" since the Sept. 11, 2001, terrorist attacks in the United States, the official said. "We are doing a number of them, and they have been very productive."

Renditions are a legitimate option for dealing with suspected terrorists, intelligence officials argue. The U.S. government officially rejects the assertion that it knowingly sends suspects abroad to be tortured, but officials admit they sometimes do that. "The temptation is to have these folks in other hands because they have different standards," one official said. "Someone might be able to get information we can't from detainees," said another.

Syria, where use of torture during imprisonment has been documented by the State Department, main-

tains a secret but growing intelligence relationship with the CIA, according to intelligence experts.

"The Syrian government has provided some very useful assistance on al Qaeda in the past," said Cofer Black, former director of counterterrorism at the CIA who is now the counterterrorism coordinator at the State Department.

One senior intelligence official said Tuesday that Arar is still believed to have connections to al Qaeda. The Justice Department did not have enough evidence to detain him when he landed in the United States, the official said, and "the CIA doesn't keep people in this country."

With those limitations, and with a secret presidential "finding" authorizing theCIA to place suspects in foreign hands without due process, Arar may have been one of the people whisked overseas by the CIA.

In the early 1990s, renditions were exclusively law enforcement operations in which suspects were snatched by covert CIA or FBI teams and brought to the United States for trial or questioning. But CIA teams, working with foreign intelligence services, now capture suspected terrorists in one country and render them to another, often after U.S. interrogators have tried to gain information from them.
Renditions are considered a covert action. Congress, which oversees the CIA, knows of only the broad au-

thority to carry out renditions but is not informed about individual cases, according to intelligence officials.

[Priest reported from Washington. Staff writers John Mintz and Glenn Kessler in
Washington contributed to this report.]

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* * *

EXHIBIT D

U.S. Department of Justice
Immigration and Naturalization Service
Final Notice of Inadmissibility
Refer to the following file number:
File No. [Redacted]
Date: October 07, 2002

To:

ARAR, Maher Abdul Hamid, aka,
ARAR, Maher
ARAR, Maher Abdul Hamid
ARAR, Maher 'Abd Al-Hamid

This concerns your application for admission to the United States at the port of John F. Kennedy International Airport / NYC and the notice of temporary inadmissibility (Form I-147) previously served on you. I have determined that you are inadmissible under:

□ Section 212(a)(3)(A) (other than clause (ii))
x Section 212(a)(3)(B)(i)(v)
□ Section 212(a)((3)(C)

of the Immigration and Nationality Act (Act).

IT IS ORDERED that you be removed without further inquiry before an immigration judge, in accordance with section 235(c) of the Act and Title 8,

Code of Federal Regulations, part 235.8. If you enter or attempt to enter the United States for any purpose, without the prior written authorization of the Attorney General, you will be subject to arrest, removal, and possible criminal prosecution.

The Commissioner of the Immigration and Naturalization Service has determined that your removal to Syria would be consistent with Article 3 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

[Signature]
(Signature of regional director)

(Printed name of regional director)

REGIONAL DIRECTOR

Certificate of Service

I have read and explained this notice to the above named alien.

[Redacted] ☐ Interpreter used: NONE
(language)

[Redacted] 10/8/02 4AM
(Printed name of officer) (Date)

I acknowledge that a copy of this notice has been given to me, read, and explained to me, and I understand it.

[Redacted] [Signature]
(Signature of alien)

In Removal Proceedings under Section 235(c) of the Immigration and Nationality Act;

FILE: [Redacted]	)
	)
IN THE MATTER OF:	)
	)
ARAR, Maher Abdul Hamid	)
a/k/a ARAR, Maher	)
a/k/a ARAR, Maher Abdul Hamid	)
a/k/a ARAR, Maher ' Abd Al-Hamid	)
	)
APPLICANT	)

Decision of the Regional Director

Introduction

In accordance with my responsibilities as Regional Director, I have, pursuant to section 235(c)(2)(B) of the Immigration and Nationality Act (INA) and 8 C.F.R. § 235.8(b), reviewed the documentation submitted to me by the New York District Director concerning the application of Maher Abdul Hamid Arar (Arar) for admission to the United States. This review has included consideration of both classified and unclassified information concerning Arar.[83] As a

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[83] Section 235(c)(2)(B)(i) of the INA states that a decision under this provision is to be based on "confidential" information. Throughout this decision, for the sake of clarity, the terms clas-

result of this review, I have concluded on the basis of classified information that Arar is clearly and unequivocally inadmissible to the United States under INA § 212(a)(3)(B)(i)(v) in that he is a member of an organization that has been designated by the Secretary of State as a Foreign Terrorist Organization, to wit: Al-Qaeda, a/k/a al-Qa'ida. In addition, pursuant to section 235(c) of the INA, and after consulting with appropriate security agencies of the United States, I have concluded that disclosure of the classified information upon which this decision is based would be prejudicial to the public interest, safety or security.

Background

Arar is a native of Syria and a citizen of Canada and Syria. Arar arrived at John F. Kennedy International Airport in New York, New York on September 26, 2002, via American Airlines [redacted] from Zurich, Switzerland. Upon arrival, Arar presented Canadian passport number [redacted] and applied for admission to transit to Canada. Upon secondary inspection, it was determined that Arar was the subject of a TECS/Nails lookout as being a member of a known terrorist organization.

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sified and unclassified are employed, rather than the term confidential.

On October 1, 2002, the Immigration and Naturalization Service initiated removal proceedings under section 235(c) of the INA against Arar with service of Form I-147, charging him with being inadmissible to the United States. Specifically, the Service charges Arar with being temporarily inadmissible under INA 212(a)(3)(B)(i)(V) in that he is an alien who is a member of a foreign terrorist organization.

On October 1, 2002, upon initiating removal proceedings against Arar under section 235(c), the INS, in accordance with 8 C.F.R. § 235.8 provided Arar with 5 days to respond to the charge. On October 1, 2002, the Service served upon Arar all unclassified documents that the Service relied upon in issuing the Form I-147. These documents included: (1) an executed I-147 noticing Arar of the requirement to respond within five days from October 1, 2002, to INS with a written statement and any accompanying information regarding the allegations and the charge of inadmissibility; (2) an attachment to the I-147 alleging Arar to be a member of an organization that has been designated by the Secretary of State as a Foreign Terrorist Organization, to wit: Al-Qaeda, and charging Arar with inadmissibility pursuant to section 212(a)(3)(B)(i)(V) of the INA; (3) a publication issued by the Department of State pursuant to section 219 of the INA listing Al-Qaeda as a Foreign Terrorist Organization; and (4) a publication from the Executive Office for Immigration Review of free legal service providers in the New York area.

Arar's Submissions

As of October 7, 2002, Arar failed to provide a written statement and any additional information in response to the charge.

Evidence of Inadmissibility

The documentation I have reviewed, including information received from other agencies, clearly and unequivocally reflects that Arar is a member of a foreign terrorist organization, to wit: Al-Qaeda, so designated by the Secretary of State pursuant to INA § 219. 66 FR 51088-01 (October 5, 2001).

The information I have reviewed is composed of both classified and unclassified materials. The following is a descriptive inventory of the more significant evidentiary materials that form the basis of my decision.

Unclassified

An INS immigration officer interviewed Arar on September 26, 2002 at JFK International Airport regarding his application for admission to the United Slates. Arar stated that he was a native of Syria and a citizen of Canada and Syria. Arar indicated that he used Canadian passport number [redacted] to apply for admission to the United States. Arar informed the immigration officer that he had lived in

Tunis, Tunisia for three months prior his application for admission. Arar denied having any affiliation or link to a terrorist organization.

The FBI interviewed Arar on September 27, 2002 at JFK International Airport. During the interview, Arar admitted his association with Abdullah Al-Malki and Abdullah Al-Malki's brother, Nazih Al-Malki. Arar advised the FBI that he was friendly with Nazih Al-Malki in Syria while they were in school together and that he [Arar] worked with Nazih Al-Malki at Nex Link Communications. Arar also advised the FBI that Al-Malki exports radios and one of his customers was the Pakistani military. Arar also advised that he had three business dealings with Al-Malki. Arar also admitted to the FBI about meeting Abdullah Al-Malki at the restaurant where he and Al-Malki went outside and talked in the rain in October 2001.

During the September 27, 2002 interview at JFK, Arar admitted knowing Ahman El-Maati.

Classified

A detailed discussion of the classified information I relied upon is contained in a separate, Classified Addendum.

Conclusions

Pursuant to section 240(c)(2) of the INA, an alien who is an applicant for admission has the burden of establishing clearly and beyond doubt that he or she is entitled to be admitted and is not inadmissible under section 212. Although Arar has denied the charge of inadmissibility, he has offered no evidence in support of his denial. Based upon all of the information made available to me, both classified and unclassified, I find that Arar is clearly and unequivocally inadmissible under INA § 212(a)(3)(B)(i)(V) in that he is a member of a foreign terrorist organization.

I have determined that Arar is a member of the designated foreign terrorist organization known as Al-Qaeda. Pursuant to section 219 of the INA, this organization could not be designated unless the "terrorist activity or terrorism of the organization threatens the security of United States' nationals or the national security of the United States." Specifically, Al-Qaeda has been found responsible for multiple terrorist attacks upon the United States, and is considered a "clear and imminent threat to the United States."[84]

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[84] "The most serious international terrorist threat to US interest today stems from Sunni Islamic extremists such as Usama bin Laden and individuals affiliated with his Al-Qaeda organization. Al-Qaeda leaders, including Usama bin Laden, had been harbored in Afghanistan since 1996 by the extremist Islamic regime of the Taliban. Despite recent military setbacks suffered by the Taliban and the apparent death of Al-Qaeda

As discussed above, and more fully in the Classified Addendum, Arar's membership in this organization bars him from admission to the United States, because he is presumed to share the goals and support methods of an organization which he freely joined and with which he continues to meaningfully associate. This organization has been determined responsible for acts of terrorism against the U.S. in the past, and represents a "clear and imminent threat to the United States."

Based upon the foregoing and upon the classified information referred to above, I further find that there are reasonable grounds to believe that Arar is a danger to the security of the United States [Redacted]

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operational commander Mohamed Atef resulting from a US bombing raid, Al-Qaeda must continue to be viewed as a potent and highly capable terrorist network. The network's willingness and capability to inflict large scale violence and destruction against US persons and interests--as it demonstrated with the September 11 attack, the bombing of the USS Cole in October 2000, and the bombings of two US embassies in east Africa in August 1998, among other plots--makes it a "clear and imminent treat to the United States." Statement for the record of J.T. Caruso, Deputy Executive Assistant Director Counterterrorism/Counterintelligence, Federal Bureau of Investigation, On Combating Terrorism: Protecting the United States Before the House Subcommittee on National Security, Veterans Affairs, and International Relations March 21, 2002. Less than one month ago, the Attorney General determined that Al-Qaeda might be planning specific attacks on the U.S. See Remarks of the Attorney General, Threat Level Press Conference, September 10, 2002.

Accordingly, for the reasons set forth above, I am satisfied that the evidence establishes that Arar is inadmissible, and I hereby ORDER that he be removed from the United States.

October 07, 2002
Date

[Signature]
J. Scott Blackman
Regional Director
Eastern Region
U.S Immigration and
Naturalization Service

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October 2002, a copy of the foregoing was served by personal service upon the applicant at MDC Brooklyn, NY

[Redacted]
Witness: [Redacted]

EXHIBIT E

Jan. 21, 2004

His Year In Hell

Canadian Tells Vicki Mabrey That He Was Deported to Syria

By Rebecca Leung

Maher Arar is a Syrian-born Canadian citizen who was taken into custody, under suspicion of being connected with al Qaeda, while changing planes in New York.

Maher Arar is a Syrian-born Canadian citizen who was taken into custody, under suspicion of being connected with al Qaeda, while changing planes in New York. (CBS) It would be more than a year before Arar would see his wife, Monia, and two children again.

It would be more than a year before Arar would see his wife, Monia, and two children again. (CBS)

(CBS) Is it possible the United States sent an innocent man out of the country to be tortured?

That's the disturbing question at the heart of a case that may reveal a secret side of the war on terrorism -- one that the government does not want to talk about.

It involves an accusation that the justice department sent a man from the U.S. to Syria to be interrogated and tortured.

The man making the claim is a Syrian-born Canadian citizen who was taken into custody, under suspicion of being connected with al Qaeda, while changing planes in New York.

Now, Maher Arar tells Correspondent Vicki Mabrey about what became his year in hell, which began when federal agents stopped him for questioning at JFK International Airport. "I cooperated with them 100 percent. And they always kept telling me, 'We'll let you go on the next plane,'" says Arar. "They did not."

It would be more than a year before Arar would see his family again. In September 2002, he'd taken his wife and two children on a beach vacation in Tunisia. But he flew home alone early for his job as a software engineer.

What he didn't know is that he'd been placed on the U.S. immigration watch list. So when the agents began questioning him, he tells 60 Minutes II that he wasn't concerned – at least not at first.

"The interrogation lasted about seven or eight hours, and then they came, and shackled me and chained me," recalls Arar. "I said, 'What's happening here?'

And they would not tell me. They said, 'You are gonna know tomorrow.'"

He spent the night in a holding cell. The next day, he was shackled, driven to the Metropolitan Detention Center in Brooklyn and locked in solitary confinement. Agents told him they had evidence that he'd been seen in the company of terrorist suspects in Canada.

"What they accused me of being is very serious. Being a member of al Qaeda," says Arar, who denies any involvement with the organization.

Arar wasn't allowed to make a phone call, so when his wife, Monia, didn't hear from him, she called the Canadian embassy.

"Nobody knew at that time where he was. He vanished," says Monia, who didn't hear from him for six days. Then, American officials acknowledged they were holding Arar in Brooklyn. A Canadian consular official visited and assured Arar he'd be deported home to Canada.

But the justice department had a different plan. After two weeks in U.S.custody, Arar was taken from his cell by federal agents in the middle of the night.

"They read me the document. They say, 'The INS director decided to deport you to Syria,'" recalls Arar.

"And of course, the first thing I did was I started crying, because everyone knows that Syria practices torture."

Arar says he knows because he was born in Syria. He emigrated to Canada with his parents as a teenager. But, returning to Syria as an accused terrorist, he had good reason to be afraid. Torture in Syrian prisons is well-documented. The state department's own report cites an array of gruesome tortures routinely used in Syrian jails. And in a speech last fall, President Bush condemned Syria, alongside Iraq, for what he called the country's "legacy of torture and oppression."

Nevertheless, deportation agents flew Arar on a specially chartered jet to Jordan, and the Jordanians drove him to Syria.

"When I arrived there, I saw the photos of the Syrian president, and that's why I realized I was indeed in Syria," says Arar. "I wished I had a knife in my hand to kill myself."

The next morning, Arar says a Syrian intelligence officer arrived carrying a black electrical cable, two inches thick and about two feet long.

"He said, 'Do you know what this is?' I said, I was crying, you know, 'Yes, I know what it is. It's a cable.' And he said, 'Open your right hand.' I opened my

right hand ... and he beat me very strongly," says Arar. "He said, 'Open your left hand.' And I opened my left hand. And he beat me on my palm, on my left palm. And then he stopped, and he asked me questions. And I said to him, 'I have nothing to hide.'"

Arar says the physical torture took place during the first two weeks, but he says he also went through psychological and mental torture: "They would take me back to a room, they call it the waiting room. And I hear people screaming. And they, I mean, people, they're being tortured. And I felt my heart was going to go out of my chest."

But Imad Moustapha, Syria's highest-ranking diplomat in Washington, says Arar was treated well. He also told Mabrey that Syrian intelligence had never heard of Arar before the U.S. government asked Syria to take him.

Did the U.S. give them any evidence to back up the claim that Arar was a suspected al Qaeda terrorist?

"No. But we did our investigations. We traced links. We traced relations. We tried to find anything. We couldn't," says Moustapha, who adds that they shared their reports with the U.S. "We always share information with anybody alleged to be in close contact with al Qaeda with the United States."

The Syrians allowed Canadian officials six short visits with Arar. But Arar says he was warned not to tell them about the torture or how he was being held – in an underground cell 3 feet wide, 6 feet long and 7 feet high. It was his home for a full 10 months.

"It's a grave. It's the same size of a grave. It's a dark place. It's underground," says Arar.

He says the Syrians were pressing him to confess he'd been to an al Qaeda training camp in Afghanistan: "They just wanted to find something that the Americans did not find -- and that's when they asked me about Afghanistan. They said, 'You've been to Afghanistan,' so they would hit me three, four times. And, if I hesitate, they would hit me again."

Arar says he signed a confession because he was "ready to do anything to stop the torture." But he claims that he had never been to Afghanistan, or trained at a terrorist camp. "Just one hit of this cable, it's like you just forget everything in your life. Everything," he says. Back in Canada, Monia was fighting for her husband's life. She marched in front of parliament, and protested in front of the U.S. embassy.

Eventually, she got the ear of then-Canadian Prime Minister Jean Chretien. On the floor of parliament, Chretian voiced mounting frustration with the U.S. The job eventually went to Gar Pardy, then one of

Canada's top diplomats, to get answers from the Americans.

"The American authorities acknowledged this was a Canadian citizen that they were dealing with. He was traveling on a Canadian passport. There was no ambiguity about any of these issues," says Pardy, who believes he should have been sent to Canada, or dealt with under American law in the United States. But not sent to Syria.

But while Canadian diplomats were demanding answers from the U.S., it turns out that it was the Royal Canadian mounted police who had been passing U.S. intelligence the information about Arar's alleged terrorist associations.

However, U.S. government officials we spoke to say they told Canadian intelligence that they were sending Arar to Syria – and the Canadians signed off on the decision.

Pardy says if that's true, it would have been wrong all around: "I would dispute that the people who were making any statements in this context were speaking for the Canadian government. A policeman talking to a policeman in this context is not necessarily speaking for the Canadian government.

And the Canadian government wanted Arar back. It took a year and a week from the time Arar was de-

tained in New York for Arar to be released. He arrived home in Canada dazed and exhausted.

Why did Syrian officials let him go? "Why shouldn't we leave him to go? We thought that would be a gesture of good will towards Canada, which is a friendly nation. For Syria, second, we could not substantiate any of the allegations against him," says Moustapha.

He added that the Syrian government now considers Arar completely innocent. But does he feel any remorse about taking a year out of Arar's life?
"If this was the case, it's not our problem," says Arar. "We did not create this problem." 60 Minutes II has learned that the decision to deport Arar was made at the highest levels of the U.S. justice department, with a special removal order signed by John Ashcroft's former deputy, Larry Thompson.

Ashcroft made his only public statement about the case in November. He said the U.S. deported Arar to protect Americans -- and had every right to do so.

"I consider that really an utter fabrication and a lie," says Michael Rather, Arar's attorney and head of the Center For Constitutional Rights. He plans to file a lawsuit against Ashcroft and several other American officials.

"They knew, when they were sending him to Syria, that Syria would use certain kinds of information-

gathering techniques, including torture, on him. They knew it," says Ratner. "That's why he was sent there. That's why he wasn't sent to Canada."

Before deporting Arar to Syria, American officials involved in the case told 60 Minutes II they had obtained assurances from the Syrian government that Arar would not be tortured -- that he would "be treated humanely"

"The fact that you went looking for assurances, which is reflected here, tells you that even in the minds of people who made this decision," says Pardy. "I mean, there were some second thoughts."

No one at the justice department would talk to 60 Minutes II on camera about Arar, but they sent us this statement saying:

"The facts underlying Arar's case... [are] classified and cannot be released publicly."

"We have information indicating that Mr. Arar is a member of al Qaeda and, therefore, remains a threat to U.S. national security."

Despite the American accusations, Arar has never been charged with a crime and, today, he's free in Canada. He's afraid, though, that he might never be able to clear his name.

Arar's case is unusual because he was sent directly from U.S. soil to Syria. But intelligence sources tell 60 Minutes II that since 9/11, the U.S. has quietly transported hundreds of terror suspects captured in different parts of the world to Middle Eastern countries for tough interrogations.

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Supreme Court, U.S.
FILED
MAY 12 2010
OFFICE OF THE CLERK

(8)

No. 09-923

In the Supreme Court of the United States

MAHER ARAR, PETITIONER

v.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, AND THE OFFICIAL CAPACITY DEFENDANTS IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
BARBARA L. HERWIG
ROBERT M. LOEB
Attorneys
Department of Justice
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(202) 514-2217

QUESTIONS PRESENTED

Petitioner sued a number of federal officials under a *Bivens* theory of liability and the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. 1350 note), seeking money damages arising from his detention in the United States and subsequent removal to Syria under provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* The questions presented are:

1. Whether the court of appeals erred in declining to create a *Bivens* remedy when the asserted claims implicate sensitive foreign-affairs and national-security matters, and when Congress did not provide for a damages remedy in the statutory scheme that governs judicial review of the issues raised in the complaint.

2. Whether the TVPA, which requires a showing that the defendant acted "under actual or apparent authority, or color of law, of any foreign nation," 28 U.S.C. 1350 note, applies to United States officials exercising authority under United States immigration law.

3. Whether the court of appeals erred in affirming the district court's dismissal of one of petitioner's claims without prejudice on the ground that the complaint failed sufficiently to allege the roles and identities of the various defendants.

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In the Supreme Court of the United States

No. 09-923

MAHER ARAR, PETITIONER

v.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, AND THE OFFICIAL CAPACITY DEFENDANTS IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-194a) is reported at 585 F.3d 559. The panel opinion of the court of appeals (Pet. App. 195a-334a) is reported at 532 F.3d 157. The district court opinion (Pet. App. 335a-426a) is reported at 414 F. Supp. 2d 250.

JURISDICTION

The judgment of the en banc court of appeals was entered on November 2, 2009. The petition for a writ of certiorari was filed on February 1, 2010 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 26, 2002, petitioner, a dual citizen of Syria and Canada, sought to exit his flight from Tunisia via Switzerland and enter the United States at JFK Airport in New York.[1] When he presented his passport to an immigration inspector, petitioner was identified as a suspected associate of al Qaeda and detained. Pet. App. 11a; C.A. App. 88. Petitioner alleges that, during the first three days of his detention, officials ignored his requests to make a telephone call and see a lawyer. Pet App. 454a-455a.

On October 1, 2002, the Immigration and Naturalization Service (INS) initiated removal proceedings, charging petitioner with being subject to removal under 8 U.S.C. 1182(a)(3)(B)(i)(V) as a member of a terrorist organization. Pet. App. 12a-13a; C.A. App. 31, 88. The same day, petitioner was permitted to telephone his family. They immediately contacted the Canadian Consulate and retained an immigration attorney in New York. Pet. App. 12a.

On October 3, an official from the Canadian Consulate visited petitioner, who expressed concern that he would be removed to Syria. Pet App. 455a-456a. On October 4, petitioner designated Canada as the country to which he wished to be removed. On October 5, petitioner met with his immigration attorney. *Id.* at 12a. The next day, the INS District Director left a message for petitioner's attorney to inform her of INS's plan to question petitioner about any objection he might have to

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[1] At JFK, petitioner planned to take a flight to Canada. Pet. App. 11a. As a matter of law, petitioner qualified as an applicant for admission to the United States when he arrived at the port of entry at JFK Airport. See 8 U.S.C. 1225(a)(1).

his removal to Syria. *Ibid.* Such questioning took place the same evening, and petitioner told the officials that he feared being tortured if he were removed to Syria. *Id.* at 457a.

On October 7, 2002, then-INS Regional Director J. Scott Blackman determined from classified and unclassified information that petitioner was "clearly and unequivocally" inadmissible under 8 U.S.C. 1182(a)(3)(B)(i)(V) as a member of al Qaeda. Pet. App. 13a; C.A. App. 87-88, 91. Concluding that "there are reasonable grounds to believe that [petitioner] is a danger to the security of the United States," *id.* at 92, Blackman ordered petitioner's removal pursuant to 8 U.S.C. 1225(c)(2)(B), which permits removal "without further inquiry or hearing by an immigration judge." C.A. App. 87-88, 108.

On October 8, 2002, the Acting Attorney General, Larry Thompson, exercised his discretionary authority under a provision of the INA authorizing the "Attorney General * * * [to] disregard" an alien's country designation if, *inter alia*, the Attorney General "decides that removing the alien to the country is prejudicial to the United States." 8 U.S.C. 1231(b)(2)(C)(iv); Pet. App. 13a. Petitioner was ordered removed to Syria on the basis that he was a "a subject, national, or citizen" of that country. 8 U.S.C. 1231(b)(2)(D). See *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 338-341 (2005). The Final Notice of Inadmissibility incorporated the INS Commissioner's "determin[ation] that [petitioner's] removal to Syria would be consistent with Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," which prohibits removal of any individ-

ual to any country where it is more likely than not that he or she would be tortured. C.A. App. 86; Pet App. 13a.

The final removal order, which includes the Convention Against Torture (CAT) determination, would have been subject to judicial review. See 8 U.S.C. 1252; Foreign Affairs Reform and Restructuring Act (FARR Act), Pub. L. No. 105-277, § 2242(b) and (d), 112 Stat. 2681-822; 8 C.F.R. 208.18(e)(1) (claims under Article 3 of the CAT may be raised "as part of the review of a final order of removal" under 8 U.S.C. 1252). No petition for review or habeas petition was ever filed.

On October 8, 2002, petitioner was flown to Jordan and handed over to Jordanian authorities, who delivered him to Syria. Pet. App. 14a. Petitioner claims that, while in Syria, he was subjected to harsh interrogation and torture by Syrian security officers. On October 20, 2002, the Canadian Embassy in Syria confirmed that petitioner was in Syria. While he was in that country, petitioner met with Canadian officials on seven occasions. *Id.* at 462a. On October 5, 2003, Syria released petitioner, and he went to Canada. *Id.* at 14a.

2. a. On January 22, 2004, petitioner filed a four-count civil complaint against current and former federal officials in the United States District Court for the Eastern District of New York.[2] Pet. App. 438a-472a. Count

[2] The complaint named as defendants former Regional Director Blackman, former INS Commissioner James Ziglar, former Deputy Attorney General Larry Thompson, and former INS District Director Edward McElroy, in their individual capacities; former Attorney General John Ashcroft and FBI Director Robert Mueller, in both their individual and official capacities; the Secretary of Homeland Security, and the Regional Director of Immigration and Customs Enforcement for the New York Region in their official capacities; and several unnamed employees of the FBI and INS in their individual capacities. C.A. App. 23-27.

One of the complaint alleged that defendants violated the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. 1350 note), by conspiring with or aiding and abetting Syrian officials to bring about petitioner's torture in Syria. Counts Two and Three asserted that defendants violated petitioner's Fifth Amendment substantive due process rights by subjecting him to torture, coercive interrogation, and prolonged detention in Syria. Count Four alleged a Fifth Amendment substantive due process claim based on petitioner's detention and alleged deprivation of access to the courts while he was in the United States. Pet. App. 15a. The complaint sought declaratory relief, as well as compensatory and punitive damages from the individual defendants. *Id.* at 471a-472a.

b. Defendants moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. In addition, the United States made a formal assertion of the state-secrets privilege. The United States explained that Counts One, Two, and Three could not be litigated without disclosure of classified information and therefore must be dismissed. C.A. App. 126-138. That assertion was supported by unclassified declarations from then-Acting Attorney General James Comey and then-Secretary of Homeland Security Tom Ridge.[3] *Id.*

[3] Acting Attorney General Comey explained: "Litigating Counts I, II and III of plaintiff's complaint would necessitate disclosure of classified information, including: (1) the basis for the decision to exclude plaintiff from this country based on the finding that plaintiff was a member of * * * al Qaeda, * * * ; (2) the basis for the rejection of plaintiff's designation of Canada as the country to which plaintiff wished to be removed, * * * ; and (3) the considerations involved in the decision to remove him to Syria." C.A. App. 131-132. Mr. Comey further declared that "disclosure of the classified information used by government officials to reach each of the three noted decisions reason-

at 129-137. Both Acting Attorney General Comey and Secretary Ridge further supported the state-secrets privilege assertion in detailed classified declarations. *Id.* at 133, 136. The government offered to provide the district court with the classified declarations further supporting the assertion of the state-secrets privilege for its *ex parte, in camera* review. *Id.* at 127.

3. Without reaching the state-secrets privilege assertion or reviewing the classified declarations, the district court granted defendants' motions to dismiss. The court first held that petitioner's request for declaratory relief did not present a case or controversy because the only continuing injury petitioner identified was the bar on his reentering the United States. Pet. App. 352a-355a. The court explained that such an injury could not supply standing for prospective relief because it was a legal consequence of the removal order, which petitioner conceded he was not seeking to challenge. *Id.* at 354a-355a.

The district court next dismissed Count One, seeking relief under the TVPA, because the defendants acted under authority of United States law, not "under actual or apparent authority, or color of law, of any foreign nation." Pet. App. 367a, 371a-372a.

Turning to Counts Two and Three, the court declined to create a constitutional damages action against the defendants for petitioner's removal to and treatment in Syria. Recognition of a *Bivens* remedy was inappropriate, the court reasoned, "in light of the national-security concerns and foreign policy decisions at the heart of this case." Pet. App. 408a-414a. The court explained that

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ably could be expected to cause exceptionally grave or serious damage to the national security interests of the United States." *Id.* at 132.

"the task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches." *Id.* at 413a.

The district court also dismissed Count Four, concerning petitioner's detention in the United States, on the ground that the complaint failed to "adequately detail which defendants directed, ordered and/or supervised the alleged violations." Pet. App. 423a. Although the court dismissed this claim without prejudice and offered petitioner the opportunity to replead, *ibid.*, petitioner chose not to do so and instead asked the court to enter final judgment, which it did. C.A. Special App. 92-93; Pet. App. 20a.

4. A panel of the Second Circuit affirmed. Pet. App. 195a-275a. The panel unanimously upheld the district court's decision that petitioner lacked standing to pursue declaratory relief. *Id.* at 269a-272a. The panel also unanimously agreed with the district court that petitioner failed to state a claim under the TVPA because the allegations in his complaint were insufficient to show that defendants acted "under color of foreign law." *Id.* at 232a-235a.

A majority of the panel affirmed the dismissal of the *Bivens* claims. The majority reasoned that, as a general matter, recognition of a *Bivens* action for claims of unlawful removal would be inconsistent with Congress's decision to create carefully delineated statutory mechanisms for judicial review of removal decisions. Pet. App. 242a-245a. The panel also agreed with the district court that the foreign policy and national security implications of this action constitute "special factors" counseling against creation of a *Bivens* remedy. *Id.* at 245-254. With respect to petitioner's allegations of pre-re-

moval mistreatment in United States custody, the majority concluded that petitioner had failed to state a claim under the Due Process Clause. *Id.* at 254-269.

Judge Sack dissented in part. Pet. App. 276a-334a. He concluded that petitioner's allegations in Counts Two, Three, and Four "adequately allege[] a violation of his substantive due process rights," *id.* at 311a, and that a *Bivens* action should lie in the context of petitioner's claims. *Id.* at 313a-331a.

5. The court of appeals heard the case en banc and again affirmed. Pet. App. 1a-194a. In an opinion by Chief Judge Jacobs, a seven-member majority agreed with the unanimous panel as well as the district court in holding that petitioner failed to state a claim under the TVPA because none of the defendants acted under color of foreign law. *Id.* at 17a-19a. The court further held that "special factors" strongly counseled against the judicial creation of a *Bivens* damages remedy in this context. *Id.* at 25a-52a. In particular, the court explained that "[a]bsent clear congressional authorization," providing a damage action here would, *inter alia*, "offend the separation of powers and inhibit this country's foreign policy." *Id.* at 38a. The court reasoned that "if Congress wishes to create a remedy for individuals like Arar, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded." *Id.* at 50a. The court also held that petitioner's allegations about the denial of access to the courts while he was detained in the United States were insufficiently specific to survive a motion to dismiss, and it reaffirmed the panel's ruling that petitioner had not established a proper basis for declaratory relief. *Id.* at 16a-17a, 20a-22a.

Judges Calabresi, Pooler, Sack and Parker each filed dissenting opinions. Pet. App. 54a-194a.

ARGUMENT

The nature of petitioner's factual allegations and the tenor of his petition warrant a clarification of the scope of the issues before this Court. This case does not concern the propriety of torture or whether it should be "countenance[d]" by the courts. Pet. 14. Torture is flatly illegal and the government has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in torture, to attempt to commit torture, or to conspire to commit torture outside the United States. *See* 18 U.S.C. 2340A. The President has stated unequivocally that the United States does not engage in torture. See May 21, 2009 Remarks by the President on National Security; cf. Exec. Order No. 13,491, § 3, 74 Fed. Reg. 4894 (Jan. 22, 2009) (directing that individuals detained during armed conflict "shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture))."

This case instead presents three narrow questions. First, petitioner argues (Pet. 11-26) that the court of appeals erred in refusing to recognize a *Bivens* claim and applied an incorrect standard for determining whether "special factors" counsel against judicial creation of such a remedy. Second, he contends (Pet. 26-30) that the defendants were acting under color of Syrian law when they ordered his removal to that country, and therefore that the court of appeals should have upheld his claim under the TVPA. And third, petitioner argues (Pet. 30-34) that the court erroneously affirmed the district court's ruling that he insufficiently pleaded his due

process claim based on his detention and alleged denial of access to courts in the United States. The court of appeals was correct in rejecting each of those contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review therefore is unwarranted.

1. Petitioner renews his challenge to the district court's ruling, which was affirmed by both the panel and en banc court of appeals, that a judicially created money-damages remedy is inappropriate for his substantive due process claims concerning his detention and treatment in Syria. That challenge does not implicate any conflict among the courts of appeals, and contrary to petitioner's contention, the analysis in the decision below is consistent with the approach this Court has prescribed. There is no reason for this Court to review the en banc court of appeals's application of settled principles to the particular facts of this case.

a. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1947 (2009). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of the plaintiff's home. In creating that common-law action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397.

Bivens "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—deci-

sions from which the Court has since "retreated" and that reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001). This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Holly* v. *Scott*, 434 F.3d 287, 290 (4th Cir.) (internal quotation marks and citation omitted), cert. denied, 547 U.S. 1168 (2006). See *Iqbal*, 129 S. Ct. at 1948 (*Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored"); cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases").

Indeed, in the four decades "since *Bivens*, the Supreme Court has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, *Davis* v. *Passman*, 442 U.S. 228 (1979); and in the context of an Eighth Amendment violation by prison officials, *Carlson* v. *Green*, 446 U.S. 14 (1980)." Pet. App. 26a-27a; see also *Western Radio Servs. Co.* v. *USFS*, 578 F.3d 1116, 1119 (9th Cir. 2009), cert. denied, No. 09-772 (May 3, 2010). "Since *Carlson*" was decided 30 years ago, this Court "ha[s] consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68.

Thus, this Court has instructed that when there is "any alternative, existing process for protecting" the plaintiff's interests, such an established process implies that Congress "expected the Judiciary to stay its *Bivens* hand" and "refrain from providing a new and freestanding remedy in damages." *Wilkie* v. *Robbins*, 551 U.S. 537, 550, 554 (2007). Even where there is no such alternative process, an implied remedy is still disfavored, and courts must make an assessment "appropriate for a common-law tribunal" about whether such judicially created relief is warranted, "paying particular heed * * * to any special factors counselling hesitation." *Id.* at 550.

b. Applying those standards, the court of appeals correctly affirmed the district court's refusal to recognize a *Bivens* claim on the ground that special factors presented by the unique circumstances of this case counsel hesitation in creating a private damages remedy.

As the en banc majority observed, the damages claims petitioner sought to assert arising from his removal to Syria implicate significant national security concerns. See Pet. App. 35a. Such claims "would necessarily require an exploration of the intelligence relied upon by the officials charged with implementing our foreign and national security policies, the confidential communications between the United States and foreign powers, and other classified or confidential aspects of those policies, including, perhaps, whether or not such policies even exist." *Id.* at 249a.[4]

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[4] The Second Circuit characterized this case as one involving "extraordinary rendition." Pet. App. 7a. Petitioner was removed not through "extrajudicial" channels but under the authority of the federal immigration laws. *Id.* at 8a n.1. The question of characterization is not material to the issues before this Court, however, because the private damages claims petitioner seeks to assert implicate the same sensitive consider-

Adjudication of a *Bivens* claim in these circumstances would also call upon the courts to review sensitive intergovernmental communications, second-guess whether Syrian officials were credible enough for United States officials to rely on them, and assess the credibility of any information provided by foreign officials concerning petitioner's likely treatment in Syria, as well as the motives and sincerity of the United States officials who concluded that petitioner could be removed to Syria consistent with Article 3 of the CAT. See Pet. App. 33a-49a; see also C.A. App. 131-132. Judicial inquiry into these types of intergovernmental communications could deter other countries from engaging in dialogue with United States officials. See Pet. App. 410a ("[G]overnments that do not wish to acknowledge publicly that they are assisting us would certainly hesitate to do so if our judicial discovery process could compromise them."). The courts below therefore properly concluded that "litigation of this sort would interfere with the management of our country's * * * relations with foreign powers and affect our government's ability to ensure national security." *Id.* at 249a-250a.

The "special factors" analysis in the decision below accords with the general principle that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981).[5] In some excep-

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ations whether the underlying conduct is termed an "extraordinary rendition" or an immigration removal based on national security grounds.

[5] See *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893) (the Constitution commits "the entire control of international relations" to

tional instances, not involving money damages, courts are required by the Constitution or a clear grant of authority from Congress to adjudicate matters directly pertaining to foreign affairs or national security. See, *e.g.*, *Boumediene* v. *Bush*, 553 U.S. 723 (2008); *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006). The general rule, however, as this Court explained in *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), is that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530.

The decision below is also consistent with decisions of other courts of appeals addressing proposed *Bivens* claims implicating similar separation-of-powers concerns. Courts have repeatedly rejected *Bivens* relief when adjudicating a money-damages claim would intrude on the conduct of foreign affairs or the protection of national security. See, *e.g.*, *Rasul* v. *Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir.) ("[F]ederal courts cannot fashion a *Bivens* action when 'special factors' counsel against

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the political Branches); *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (foreign policy matters are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility."); *Schneider* v. *Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) ("To determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policy-making."), cert. denied, 547 U.S. 1069 (2006); *Holtzman* v. *Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (refusing to adjudicate claim that bombing of Cambodia during the Vietnam conflict required separate Congressional authorization), cert. denied, 416 U.S. 936 (1974); *DaCosta* v. *Laird*, 448 F.2d 1368 (2d Cir. 1971) (court was not competent to judge significance of mining and bombing of North Vietnam's harbors and territories for purposes of determining whether Congressional authorization was required), cert. denied, 405 U.S. 979 (1972).

doing so * * * . The danger of obstructing U.S. national security policy is one such factor."), cert. denied, 130 S. Ct. 1013 (2009); *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) ("if we were to create a *Bivens* remedy, the litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of national security and sensitive intelligence information"), cert. denied, 129 S. Ct. 2825 (2009); *Beattie* v. *Boeing Co.*, 43 F.3d 559, 563-566 (10th Cir. 1994) ("The unreviewability of the security clearance decision is a 'special factor counselling hesitation,' which precludes our recognizing a *Bivens* claim."), cert. denied, 514 U.S. 1127 (1995); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (refusing to recognize a *Bivens* action against "military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad."). As this Court has recognized, that the decision at issue is entrusted by the Constitution to the discretion of Congress or the Executive is an important factor counseling hesitation. Cf. *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987) ("The special facto[r] that counsel[s] hesitation is * * * the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.") (brackets in original); *Chappell* v. *Wallace*, 462 U.S. 296, 301-304 (1983) (declining to imply *Bivens* remedy against military officers by enlisted personnel in part because the Constitution vests principal responsibility for military matters in Congress and the President).

Petitioner argues (Pet. 11-12) that none of these considerations counsel against recognition of a *Bivens* remedy because the same considerations would also be implicated if petitioner had sought review of his removal through existing channels. As explained below, how-

ever, the existence of specific mechanisms for judicial review that do not include a private damages remedy is a reason for courts to avoid creating such a remedy, not an argument in favor of such relief. See pp. 19-22, *infra*. In any event, petitioner's argument rests on an erroneous premise. Although appellate courts routinely consider CAT Article 3 claims in their administrative review of removal orders, courts ordinarily do not delve into Executive Branch communications with foreign officials or second-guess sensitive determinations made on the basis of those communications. Indeed, this Court's reasoning in *Munaf* makes clear that courts are not well equipped to conduct that sort of inquiry. See *Munaf* v. *Geren*, 128 S. Ct. 2207, 2225-2226 (2008) ("The Judiciary is not suited to second-guess * * * determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area. In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is.") (citation omitted). The overwhelming majority of immigration-review cases raising a CAT claim are adjudicated in immigration courts (and reviewed in the courts of appeals) based on country reports and other administrative record material that is compiled in accordance with the statutory review scheme and incorporates no Executive Branch dialogue with foreign officials.[6]

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[6] Petitioner cites (Pet. 12 n.6) *Khouzam* v. *Attorney General of the United States*, 549 F.3d 235 (3d Cir. 2008), for the proposition that courts review CAT Article 3 claims despite foreign policy and national security implications. But the Third Circuit recognized that such review—in that case, of a Secretary of Homeland Security determination

c. In addition to challenging the court of appeals' application of the "special factors" analysis, petitioner attacks (Pet. 15-20) the court of appeals' formulation of that doctrine, contending that the court articulated a "virtually irrebuttable presumption against *Bivens* actions" that is inconsistent with this Court's cases. Pet. 15. That characterization of the decision below is incorrect, and in any event, the proper formulation of the *Bivens* standard is neither squarely presented here nor appropriate for review at this time.

Petitioner contends that the court erred by considering only those factors that counsel against a *Bivens* claim and refusing to consider factors favoring such relief. Pet. 15. But that is not an accurate description of the court's analysis. The principal argument in favor of *Bivens* relief in this case is the same as in almost all others in which a plaintiff seeks recognition of such a claim: in the absence of a judicially created money-damages remedy, the plaintiff will not receive any monetary compensation for his injury from the claimed constitutional violation and the alleged misconduct will go under-de-

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to terminate a deferral of removal based upon diplomatic assurances—raised the prospect of the court delving into questions such as "whether the assurances were given in good faith; the country's record of torture; the country's record of complying with previous assurances; whether there will be a mechanism to verify compliance with the assurances; the identity and position of the official relaying the assurances; and the incentives and capacity of the country to comply with the assurances." *Id.* at 251-252. The court also recognized that some of these inquiries "may lack judicially discoverable and manageable standards." *Ibid.* In the end, the court did not authorize judicial assessment of such assurances, but instead remanded the matter to the assigned administrative tribunal, the BIA, to "ensure that Khouzam is afforded due process before he may be removed on the basis of diplomatic assurances." *Id.* at 259.

terred. See *Davis*, 442 U.S. at 245 ("For Davis, as for Bivens, 'it is damages or nothing.'") (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment)). The court of appeals did not ignore that factor; indeed, it held that any special factors counseling hesitation must be sufficiently weighty to "justify the absence of a damages remedy for a [constitutional violation]." Pet. App. 31a-32a. The court's reasoning simply reflects the fact that, by its nature, the inquiry into whether "special factors counsel hesitation" focuses on reasons why courts should *not* create a non-statutory remedy despite the general considerations that may favor such relief. The court was therefore correct in stating that, in the "special factors" analysis, "no account is taken of countervailing factors that might counsel alacrity or activism." *Ibid.*

Petitioner also faults the court of appeals for stating that the threshold for declining to recognize a *Bivens* remedy on the basis of "special factors" is "remarkably low." Pet. 20. That statement appears consistent with this Court's repeated emphasis that implied causes of action are disfavored and its refusal to recognize a new *Bivens* claim in the last three decades. See pp. 10-12, *supra*. But in any event, the court of appeals' characterization of the "special factors" threshold is not properly presented here. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (citation omitted). The court concluded that the special factors counseling hesitation in this case were compelling, and its decision therefore plainly did not turn on the minimum requirements for rejecting a *Bivens* action on such grounds. See, *e.g.*, Pet. App. 34a ("It is a substantial understatement to say that one must hesitate before extending

Bivens into such a context."); *id.* at 38a (concluding that national security "concerns must counsel hesitation in creating a new damages remedy that Congress has not seen fit to authorize."); *id.* at 44a ("These considerations strongly counsel hesitation."). Even if the question of the "special factors" threshold were properly presented, moreover, review of that question would not be warranted now. Less than three years ago, in *Wilkie*, this Court addressed and applied the standards that inform the creation of *Bivens* relief. 551 U.S. at 549-568. No conflict among the courts of appeals about "special factors" analysis has arisen in the wake of that decision, and there is thus no need for this Court to revisit the issue at this time.

d. This Court's review of the "special factors" analysis in the decision below would be inappropriate for an additional reason. As noted above, the fact that there is "'any alternative, existing process for protecting' the plaintiff's interests * * * [implies] that Congress 'expected the Judiciary to stay its *Bivens* hand' and 'refrain from providing a new and freestanding remedy in damages.'" *Western Radio Servs. Co.*, 578 F.3d at 1120 (quoting *Wilkie*, 551 U.S. at 550, 554). In this context, Congress has devised a statutory scheme governing judicial review of the core issues raised by petitioner's complaint, and that scheme leaves no room for a freestanding, judicially created damages action of the kind petitioner seeks to pursue.

The INA states that, except as provided in that statute, federal courts lack jurisdiction to review "any action taken or proceeding brought to remove an alien." 8 U.S.C. 1252(b)(9). As amended in 2005, the INA explicitly directs that claims concerning CAT Article 3 may be presented only through a petition for review of

a final order of removal, "[n]otwithstanding any other provision of law (statutory or nonstatutory)." 8 U.S.C. 1252(a)(4). Similarly, the FARR Act limits judicial enforcement of CAT Article 3. See FARR Act § 2242(d), 112 Stat. 2681-822 ("nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under [the CAT] or this section, or any other determination made with respect to the application of the policy set forth * * * except as part of the review of a final order of removal").

Congress's refusal to provide for additional relief outside these prescribed channels cannot be deemed an "oversight." *Hudson Valley Black Press* v. *IRS*, 409 F.3d 106, 110 (2d Cir. 2005). To the contrary, Congress has repeatedly addressed the appropriate mechanisms for judicial review in this area without enacting a private damages remedy. When the Senate provided its advice and consent to ratification of the CAT in 1990, it specified that Articles 1 through 16 of the CAT were not self-executing, with the result that those provisions are not privately enforceable in United States courts. 136 Cong. Rec. 36,198 (1990); see *Wang* v. *Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003). When Congress enacted the FARR Act in 1998, it limited judicial consideration of claimed violations of Article 3 of the CAT to "the review of a final order of removal." FARR Act § 2242(d). And when it passed the REAL ID Act in 2005, Congress reemphasized that "[n]otwithstanding any other provision of law (statutory or nonstatutory), * * * a petition for review filed with an appropriate court of appeals * * * shall be the sole and exclusive means for judicial review of any cause or claim under [CAT Article 3]." 8 U.S.C. 1252(a)(4).

These provisions reflect Congress's clear intent to provide a single avenue for "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States." 8 U.S.C. 1252(b)(9). Those tightly circumscribed provisions cannot be squared with judicial creation of the private damages claims set forth in petitioner's complaint. Counts Two and Three of that complaint amount to a wide-ranging collateral challenge to petitioner's removal and the CAT Article 3 determination concerning whether it was more likely than not that he would be tortured in Syria. Similarly, the conduct for which petitioner seeks damages in those counts consists entirely of "action[s] taken or proceeding[s] brought to remove an alien." *Ibid.* Wholly apart from the "special factors" on which the en banc court of appeals relied in rejecting petitioners' claims, therefore, *Bivens* relief would be inconsistent with the existing remedies that Congress has prescribed. For that additional reason, review of the court of appeals' special factors discussion is unwarranted.

Petitioner contends (Pet. 11-15) that the existing statutory scheme does not counsel against recognition of his *Bivens* claim because, he asserts, the defendants intentionally obstructed his ability to pursue it. As an initial matter, it is not clear that petitioner lacked all recourse through the congressionally prescribed channels. Then-existing law permitted the filing of a habeas action seeking petitioner's release in advance of the removal decision. *Michael* v. *INS*, 48 F.3d 657, 661 (2d Cir. 1995) (granting stay of removal in habeas case filed before the removal order became final); cf. *INS* v. *St. Cyr*, 533 U.S. 289, 309 (2001). In addition, petitioner's

counsel could have sought review of the removal order even after petitioner was removed from the United States. See *Nken* v. *Holder*, 129 S. Ct. 1749, 1755 (2009) (noting that, effective April 1, 1997, Congress repealed the provision that had barred petitions for review filed after removal).

More important, even if petitioner's premise were correct, this Court has made clear that when Congress establishes a comprehensive framework of administrative or judicial review, a court should not imply an additional non-statutory damages remedy against individual officials even when a claimed constitutional injury would "go unredressed" within that statutory scheme. *Chilicky*, 487 U.S. at 424-425 (*Bivens* remedy unavailable even though no money damage remedy was available for the alleged constitutional violation under the statutory review scheme). There is no circuit conflict concerning that legal proposition that would warrant this Court's review.

e. Contrary to the assertions of petitioner and his *amici*, judicial refusal to create a private cause of action in this context "does not leave the executive power unbounded." *Schneider* v. *Kissinger*, 412 F.3d 190, 200 (D.C. Cir. 2005), cert. denied, 547 U.S. 1069 (2006). While the aggrieved party may have no private remedy for money damages, "[i]f the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance." *Ibid.* Far more important than the vagaries of implied actions for money damages is a range of positive law. As noted above, the government has condemned torture in the strongest terms and adopted various measures to ensure that it does not occur. See p. 9, *supra*. This case simply does

not involve any broad issue concerning torture, but instead presents only the narrow question whether courts should create a private damages remedy when Congress has not seen fit to do so and when such a remedy would raise serious separation-of-powers concerns. This Court's review of that limited issue is unwarranted.[7]

2. The court of appeals correctly affirmed the dismissal of petitioner's claim under the TVPA, and the court's decision does not implicate any conflict of authority.

a. The TVPA creates liability only for defendants who act "under actual or apparent authority, or color of law, of any foreign nation." TVPA, § 2(a), 106 Stat. 73. See H.R. Rep. No. 367, 102d Cong., 1st Sess. 7 (1991) (TVPA creates liability for "any person who, under the authority of any foreign nation, tortures or extrajudicially kills any person"). The defendants in this case were acting under color of United States law, not the law of Syria, Canada, or any other foreign nation. Indeed, petitioner's own complaint repeatedly alleges that the defendants' actions were taken "under color of law and their authority as federal officers." Pet. App. 467a, 468a, 469a.

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[7] Petitioner contends (Pet. 19) that the Second Circuit should have considered that "the State Department has officially represented" that the United States provides "remedies for torture by federal officials through *Bivens* actions." But the State Department identified *Bivens* as only one of "various avenues for seeking redress" and cautioned that the application of *Bivens* relief depended "on the location of the conduct, the actor, and other circumstances." United States Dep't of State, *United States Written Response to Questions Asked by the United Nations Committee Against Torture* 10 (April 28, 2006), http://www.state.gov/documents/organization/68662.pdf. That statement is entirely consistent with the denial of *Bivens* relief in the particular circumstances of this case.

There is nothing in the text or legislative history of the TVPA to suggest that the Act applies to the conduct of federal officials taken under the color of federal law. In signing the law, the President formally expressed the view that it would not extend to such conduct.[8] And as the district court noted, it is significant that when Congress created a damages remedy in the TVPA, it did not extend that remedy to the conduct of United States officials acting under color of United States law, nor did it provide any monetary damages remedy when it enacted the FARR Act to implement the CAT prohibition on removal of an individual to a country where it is more likely than not that he will be tortured. See Pet. App. 409a.

Petitioner's allegation that his removal resulted from a conspiracy between United States and foreign officials does not convert the defendants into agents of the Syrian government. See *Schneider* v. *Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004) ("Dr. Kissinger was most assuredly acting pursuant to U.S. law * * * , despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law."), aff'd on other grounds, 412 F.3d 190 (D.C. Cir. 2005). To sustain a TVPA claim, petitioner was required to "adequately allege that the defendants possessed power un-

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[8] See Statement By President George Bush Upon Signing H.R. 2092, 28 Weekly Comp. Pres. Doc. 465, 466 (Mar. 12, 1992) ("I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad or law enforcement actions. Because the Act permits suits based only on actions 'under actual or apparent authority, or color of law, of any foreign nation,' I do not believe it is the Congress' intent that H.R. 2092 should apply to United States Armed Forces or law enforcement operations, which are always carried out under the authority of United States law.").

der Syrian law, and that the offending actions (*i.e.*, [petitioner's] removal to Syria and subsequent torture) derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power." Pet. App. 18a. As the unanimous panel explained, "[t]he complaint contains no such allegation." *Ibid.* The court of appeals therefore correctly held that the alleged conduct did not fall within the scope of the TVPA.[9]

b. The court of appeals' dismissal of petitioner's TVPA claim does not conflict with the decision of any other court of appeals. Indeed, in every case in which a federal official has been sued under the TVPA for actions taken within the scope of his office, courts have held that the TVPA does not apply. *See Schneider*, 310

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[9] Petitioner relies (Pet. 28-29) on decisions addressing liability under 42 U.S.C. 1983, contending by analogy that "willful participation in joint action" between the United States and a foreign country is the only showing necessary to sue federal officials under the TVPA. Pet. 27 (quoting *Dennis* v. *Sparks*, 449 U.S. 24 (1980)). As the court of appeals noted, that is "remarkable" proposition, which would effectively "render a U.S. official an official of a foreign government when she deals with that foreign state on matters involving intelligence, military, and diplomatic affairs." Pet. App. 19a n.3. Even in the Section 1983 context, courts have held that "[b]ecause federal officials typically act under color of *federal* law, they are rarely subject to liability under § 1983." *Strickland ex rel. Strickland* v. *Shalala*, 123 F.3d 863, 866 (6th Cir. 1997). Courts applying Section 1983 "focus on the actual nature and character" of the challenged conduct in evaluating whether a federal official can be deemed to have acted under state law. *Strickland*, 123 F.3d at 866. Here, at all times, the individual defendants were acting within the scope of their employment as officials of the United States and were carrying out the immigration laws and policies of the United States. The "nature and character" of their conduct was thus distinctly federal; at no time were they "clothed with the authority of [Syrian] law." *West* v. *Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)).

F. Supp. 2d at 267; *Harbury* v. *Hayden*, 444 F. Supp. 2d 19, 41-43 (D.D.C. 2006), aff'd on other grounds, 522 F.3d 413 (D.C. Cir. 2008); *Gonzalez-Vera* v. *Kissinger*, No. CIV. A. 02-02240, 2004 WL 5584378, *8-10 (D.D.C. Sept. 17, 2004) aff'd on other grounds, 449 F.3d 1260 (D.C. Cir. 2006), cert. denied, 549 U.S. 1206 (2007). The cases cited by petitioner as creating a conflict (Pet. 27-28) are inapposite because they do not involve suits under the TVPA against federal officials acting under federal law. Thus, there is no split of authority requiring this Court's review.

3. Petitioner argues (Pet. 30-34) that the court of appeals erred in affirming the dismissal of petitioner's substantive due process claim alleging denial of access to court while he was detained in the United States.[10] The district court dismissed that count without prejudice as insufficiently pleaded and invited petitioner to replead it in order to "articulate more precisely the judicial relief he was denied" and to "name those defendants that were personally involved in the alleged unconstitutional treatment." Pet App. 20a. Petitioner elected (in his counsel's words) to "stand on the allegations of his original complaint." *Ibid.*

Petitioner now presents a factbound challenge to the district court's conclusion that his broad allegations of conspiracy were insufficient. Both the panel and en banc court of appeals reviewed the district court's reasoning and correctly upheld it. As the court of appeals explained:

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[10] In his petition, as in his en banc brief, petitioner does not contend that defendants violated a right of access to counsel. The panel majority noted that because he was an unadmitted alien, petitioner had neither a constitutional nor statutory right to counsel. Pet. App. 256a-263a.

> Arar alleges that "Defendants"—undifferentiated—"denied Mr. Arar effective access to consular assistance, the courts, his lawyers. and family members" in order to effectuate his removal to Syria. But he fails to specify culpable action taken by any single defendant, and does not allege the "meeting of the minds" that a plausible conspiracy claim requires. He alleges (in passive voice) that his requests to make phone calls "were ignored," and that "he was told" that he was not entitled to a lawyer, but he fails to link these denials to any defendant, named or unnamed.

Pet. App. 21a. Given these omissions, and in view of petitioner's rejection of an opportunity to replead with more detail, the court of appeals did not err in affirming the dismissal of this claim.

Petitioner's claim was properly dismissed for an additional reason. To state an access-to-court claim, a plaintiff "must identify a 'nonfrivolous,' 'arguable' underlying claim" that was lost due to the alleged obstruction. See *Christopher* v. *Harbury*, 536 U.S. 403, 415 (2002). The existence of such an underlying claim "is an element that must be described in the complaint." *Ibid.* Petitioner failed to identify such a claim in Count Four of his complaint, even after the district court invited him to replead that count. Instead, he merely alleged in conclusory fashion that he was unable to "petition the courts for redress of his grievances." Pet. App. 471a. Under *Harbury*, that pleading failure by itself was fatal to this claim and further supports the decision below.

Finally, petitioner's factbound argument about the sufficiency of his allegations in Count Four, which has been reviewed on three different occasions, presents no

issue of significance or circuit conflict that would warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

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(9)

No. 09-923

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IN THE

Supreme Court of the United States

MAHER ARAR,
Petitioner,

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS THOMPSON, MUELLER, ZIGLAR, BLACKMAN, AND McELROY IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Maher Arar—a dual Syrian-Canadian national—was detained at the U.S. border and removed to Syria under the Immigration and Nationality Act ("INA") after being adjudicated a member of a foreign terrorist organization. Petitioner sued a number of federal officials for money damages under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Torture Victim Protection Act, 28 U.S.C. § 1350, note ("TVPA"), seeking damages arising from his detention in the U.S., his removal to Syria, and his alleged subsequent mistreatment by Syrians in Syria. The questions presented are:

1. Whether the court of appeals erred in declining to create a *Bivens* damages remedy for petitioner, based on his removal to Syria and alleged mistreatment by Syrians in Syria, where those claims would implicate serious national-security and foreign-policy concerns, and the review scheme Congress established under the INA does not provide for damages.

2. Whether the TVPA, which applies only to persons acting "under actual or apparent authority, or color of law, *of any foreign nation*," 28 U.S.C. § 1350, note § 2(a)(1) (emphasis added), extends to U.S. government officials, acting within the U.S., and exercising statutory authority provided by U.S. statutes in pursuit of U.S. policy goals.

3. Whether petitioner's *Bivens* claim alleging denial of access to U.S. courts was properly dismissed with leave to amend where petitioner failed to adequately allege the identities of and actions taken by the various defendants allegedly responsible for the claimed denial of access.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS THOMPSON, MUELLER, ZIGLAR, BLACKMAN, AND McELROY IN OPPOSITION

STATEMENT

This damages action arises from the detention of petitioner Maher Arar—a dual citizen of Syria and Canada—at the border and his removal to Syria, where he claims he was tortured by Syrian officials.[1] Petitioner

[1] Petitioner initially sought declaratory relief against certain officials in their official capacities, but petitioner no longer challenges the dismissal of those claims. Pet. App. 17a, 269a-272a, 352a-355a. Only petitioner's money-damages claims remain at issue.

was removed to Syria after being adjudicated a member of a foreign terrorist organization; it was determined there were reasonable grounds to believe petitioner represented a danger to U.S. security; and it was further determined that sending an al Qaeda member to Canada—which shares a porous, 5,525-mile border with the U.S.—would be prejudicial to this Nation's interests.

1. Petitioner arrived at New York's JFK airport from Tunisia on September 26, 2002, after transiting through Zürich; petitioner was booked on a connecting flight to Montreal. Pet. App. 452a. When petitioner presented his passport, an immigration officer discovered a "lookout" identifying petitioner as a member of a terrorist organization. *Id.* at 584a. Petitioner was detained and later transferred to a detention center in Brooklyn. *Id.* at 453a-455a.

On October 1, 2002, the INS initiated removal proceedings on the ground that petitioner was a member of a designated terrorist organization and thus inadmissible under 8 U.S.C. § 1182(a)(3)(B)(i)(V). Pet. App. 340a, 455a. Petitioner was informed in writing that he had five days (until October 6) to respond or face removal. *Id.* at 585a. Petitioner contacted his family, which retained counsel for him. *Id.* at 455a. Petitioner met with a Canadian Consulate representative on October 3, and with his attorney on October 5. *Id.* at 455a-456a. Petitioner's attorney took no action by the October 6 deadline or any time thereafter.

On October 7, based on classified information and petitioner's own statements, then-INS Regional Director Blackman found that petitioner was "clearly and unequivocally inadmissible" as a "member of a Foreign Terrorist Organization" (al Qaeda). Pet. App. 583a-584a. Finding "reasonable grounds to believe that [petitioner]

is a danger to [U.S.] security," the Regional Director ordered petitioner's removal without a hearing under 8 U.S.C. § 1225(c)(2)(B). *Id.* at 583a-584a, 589a-590a. While petitioner now denies membership in al Qaeda, he disclaimed any "challenge [to] the determination that he was associated with al Qaeda" in "this lawsuit." See Pet. En Banc Br. 20.

On October 8, then-Deputy Attorney General Thompson, as acting Attorney General in the Attorney General's absence, determined that removing petitioner to Canada would be "prejudicial to the United States" within the meaning of 8 U.S.C. § 1231(b)(2)(C)(iv).[2] The INS then notified petitioner that he would be removed to Syria as an alternate country of which he was "a subject, national, or citizen," under 8 U.S.C. § 1231(b)(2)(D). Pet. App. 458a. Petitioner requested protection under the Convention Against Torture ("CAT"). The INS, however, determined that petitioner could be removed to Syria consistent with the CAT; that determination was incorporated into a Final Notice of Inadmissibility. *Id.* at 458a, 582a. Petitioner was flown to Jordan; Jordanian officials then transported petitioner to Syria. *Id.* at 458a-459a.

Petitioner alleges that Syrian authorities tortured him for 12 days and threatened him with torture thereafter. Pet. App. 459a. He alleges that he was kept in a "tiny underground cell" until his release on October 5, 2003. *Id.* at 461a-463a.

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[2] An Inspector General's report observes that Thompson rejected petitioner's request to be removed to Canada because "the porous nature of the Canadian/US border w[ould] allow [petitioner] easy access to the United States." Dep't of Homeland Security Office of Inspector General, The Removal of a Canadian Citizen to Syria 6 (Addendum Mar. 2010).

2. a. On January 22, 2004, petitioner filed this action against Attorney General John Ashcroft, Deputy Attorney General Larry D. Thompson, FBI Director Robert Mueller, INS Commissioner James W. Ziglar, INS Regional Director J. Scott Blackman, and INS officer Edward J. McElroy, all in their individual capacities. See Pet. App. 438a-472a. Petitioner has abandoned his claims for non-monetary relief. See p. 1 n.1, *supra*.[3]

Count I of the complaint asserts that respondents violated the Torture Victim Protection Act, 28 U.S.C. § 1350, note, by "acting in concert with," "conspir[ing] with," or "aid[ing] and abett[ing]" Jordanian and Syrian officials "in bringing about" the violation of petitioner's "right not to be tortured." Pet. App. 465a. Counts II and III assert claims under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that respondents conspired "to deport [petitioner] to Syria for the purpose [of] coercive interrogation and torture in that country" (Count II), Pet. App. 466a, and "for the purpose [of] arbitrary, indefinite detention" there (Count III), *id.* at 468a. Count IV asserts *Bivens* claims arising from petitioner's detention in the U.S., including interference with his access to counsel and the courts. *Id.* at 470a-471a. The complaint also alleges that petitioner's conditions of confinement in the U.S. violated due process, *id.* at 470a, but petitioner does not challenge the dismissal of those claims, see *id.* at 265a-269a, 425a-426a. Petitioner alleges that respondents acted "under * * * their authority as federal officers." *Id.* at 466a, 468a, 469a.

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[3] This brief is submitted by respondents Thompson, Mueller, Ziglar, Blackman, and McElroy in their individual capacities.

While not legally relevant at this stage, respondents should be clear: They did *not* conspire or seek to deport petitioner for the purpose of or knowing that he would be tortured in Syria. Respondents thus take issue with petitioner's claim that the reports of a Canadian commission and of the Inspector General of the U.S. Department of Homeland Security "confirm" "most of" his allegations. Pet. 7. Neither report supports petitioner's allegation that respondents removed him to Syria intending that he be tortured there. To the contrary, both documents acknowledge that Syria assured U.S. officials that petitioner would *not* be tortured. *See* Dep't of Homeland Security Office of Inspector General, The Removal of a Canadian Citizen to Syria 5, 22 (Mar. 2008); Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Analysis and Recommendations 156 (2006). Nor is there any basis for petitioner's claim that respondents sought to deny him access to the courts. Nonetheless, taking the complaint's well-pleaded factual allegations as true, further review is still unwarranted, for the reasons below.

b. On February 16, 2006, the district court dismissed the complaint. Pet. App. 335a-426a. The court held that the Immigration and Nationality Act ("INA") did not deprive it of jurisdiction. Pet. App. 391a. But it dismissed each count for failure to state a claim. *Id.* at 355a-373a, 391a-426a.

As to Count I, the district court observed that the TVPA creates a cause of action against any "'individual who, under actual or apparent authority, or color of law, of any foreign nation * * * subjects an individual to torture.'" Pet. App. 356a (quoting 28 U.S.C. § 1350, note § 2(a)(1)). The court ruled that respondents had not acted under color of foreign law. *Id.* at 372a-373a, 425a.

To the contrary, they had acted under color of U.S. law. *Id.* at 368a.

The district court also dismissed the two *Bivens* claims (Counts II and III) related to petitioner's removal to, detention in, and alleged mistreatment in Syria. Those claims, the court observed, "present[] broad questions touching on the role of the Executive branch combating terrorist forces," on "coordination between law-enforcement and foreign-policy officials," and on "complex relationships with foreign governments." Pet. App. 409a. Extending *Bivens* to a context so laden with "national-security and foreign policy" concerns, the court held, would "trammel[] upon matters best decided by coordinate branches of government." *Id.* at 405a, 408a-414a. The court also dismissed petitioner's claim of interference with access to the courts (Count IV). *Id.* at 423a. Petitioner's complaint failed to "adequately detail which defendants directed, ordered and/or supervised the alleged" denial of access. *Ibid.* Nor did the complaint "articulate * * * the judicial relief [petitioner] was denied." *Id.* at 421a. The court gave petitioner leave to re-plead and cure those deficiencies. *Id.* at 425a-426a. Petitioner declined and requested entry of judgment. C.A. Spec. App. 92; see Pet. App. 421a.

3. The court of appeals affirmed. Pet. App. 195a-275a. The panel acknowledged that there was a substantial question whether "the INA deprived the District Court of subject matter jurisdiction." *Id.* at 224a. Rather than address jurisdiction, however, the court affirmed on other grounds. *Id.* at 224a-225a.

The panel unanimously agreed that petitioner's TVPA claim was properly dismissed because respondents did not act under color of foreign law. Pet. App. 234a-235a. A majority of the panel also agreed with the district court

that *Bivens* could not be extended to encompass the claims arising from petitioner's removal to and alleged mistreatment in Syria (Counts II and III). "[T]he review procedures set forth by the INA," the majority held, "provide a convincing reason for us to resist recognizing a *Bivens* cause of action for [petitioner's] claims arising from his alleged detention and torture in Syria." *Id.* at 245a (citation and internal quotation marks omitted). Alternatively, special factors counseled against creating a *Bivens* remedy because "adjudication of the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country's relations with foreign powers." *Id.* at 246a.

The panel majority also held that petitioner's claim relating to his treatment in the U.S. (Count IV) was properly dismissed. Petitioner had failed to establish that, as an unadmitted alien, "he possessed any entitlement to a pre-removal hearing" or to "the assistance of counsel." Pet. App. 262a-263a. The majority further explained that *Christopher* v. *Harbury*, 536 U.S. 403 (2002), required petitioner to identify the cause of action he was prevented from asserting. Pet. App. 263a-264a. The complaint, however, "fail[ed] to set forth adequately 'the underlying cause of action'" that "defendants' conduct compromised." *Id.* at 264a (quoting 536 U.S. at 418).

Judge Sack dissented from the portion of the opinion dismissing the *Bivens* claims. Pet. App. 276a-334a.

4. On rehearing *en banc*, the court of appeals affirmed. Pet. App. 1a-53a. The seven-judge *en banc* majority acknowledged the possibility that "the INA bar defeats [subject-matter] jurisdiction," but declined to address jurisdiction because petitioner's claims were properly "dismissed at the threshold for other reasons." *Id.* at 25a.

The majority agreed that Count I failed to state a TVPA claim because it contained "no * * * allegation" that respondents acted under color of foreign law. Pet. App. 18a. To the contrary, respondents are federal officials who "are alleged to have acted under color of *federal* [law], * * * in accordance with alleged *federal* policies and in pursuit of the aims of the *federal government* in the international context." *Id.* at 19a (emphasis added).

Turning to petitioner's *Bivens* claims, the court held that the denial-of-access claims were properly dismissed because petitioner failed to "allege facts indicating that the defendants were personally involved in the claimed constitutional violation." Pet. App. 20a-21a. The complaint "fail[ed] to specify culpable action taken by any single defendant, and [did] not allege the 'meeting of the minds' that a plausible conspiracy claim requires." *Id.* at 21a. Under *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), that "omission," coupled with "[petitioner's] rejection of an opportunity to replead," required dismissal. Pet. App. 20a-21a.

Finally, the majority declined to extend *Bivens* to create a damages action for petitioner's removal to Syria and mistreatment there by Syrian officials. The majority observed that the judicially created *Bivens* remedy "should rarely if ever be applied in 'new contexts.'" Pet. App. 26a. In this case, the majority held, "special factors sternly counsel hesitation." *Id.* at 31a.[4] The majority

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[4] The majority also noted "several possible alternative remedial schemes" bearing on petitioner's allegations—including those under the INA and the Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231 note ("FARRA")—that ordinarily would raise "a strong inference that Congress intended the judiciary to stay its hand and refrain from creating a *Bivens* action in this context." Pet.

observed that this Court "has expressly counseled that matters touching upon foreign policy and national security fall within 'an area of executive action in which courts have long been hesitant to intrude' absent congressional authorization." Pet. App. 35a (quoting *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993) (some quotation marks omitted)). *Bivens* damages actions like petitioner's—a suit by an alien claiming that he was detained at the border and removed to a foreign nation where he was mistreated by foreign officials, allegedly because of secret national-security and diplomatic communications between the U.S. and foreign powers—would "intrude" deeply into those areas. Such a suit would not merely "enmesh the courts ineluctably in an assessment of the validity and rationale of [the government's extraordinary rendition] policy and its implementation," implicating both foreign relations and national security issues. *Id.* at 34a-35a. It would also require the courts to delve into confidential information "that cannot be introduced into the public record," *id.* at 40a, including "what was done by the national security apparatus of at least three foreign countries, as well as the United States" when they determined that petitioner was affiliated with al Qaeda and that his removal to Syria was appropriate, *id.* at 39a.

For example, it would require inquiry into the nature and validity of Syria's "private diplomatic assurance" to the U.S. that petitioner would not be tortured consistent with the CAT; that issue by itself would implicate "the extent of secret diplomatic relationships," harming foreign policy and national security. Pet. App. 42a-43a. The majority also noted that creating a *Bivens* action in

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App. 29a-30a. The majority, however, declined to decide the case on those grounds.

this context creates opportunities for "graymail," *i.e.*, lawsuits brought to force the government to settle for fear that litigation would reveal classified information. *Id.* at 44a. The majority thus concluded that "Congress is the appropriate branch of government to decide under what circumstances (if any) these kinds of policy decisions—which are directly related to the security of the population and the foreign affairs of the country—should be subjected to the influence of litigation brought by aliens." *Id.* at 49a.[5]

Judges Sack (Pet. App. 54a-124a), Parker (*id.* at 125a-156a), Pooler (*id.* at 157a-172a), and Calabresi (*id.* at 173a-194a) each dissented.

REASONS FOR DENYING THE PETITION

The decisions below are correct and do not conflict with any decision of this Court or any other court of appeals. Petitioner's principal claim (embodied in Counts II and III of his complaint) is that the Court should extend *Bivens* to create a damages action in favor of an alien claiming he was denied entry at the border and removed to a foreign country—and then mistreated by foreign officials there—because of alleged secret national-security and diplomatic communications with that foreign country's government. The factors that counsel hesitation before extending *Bivens* damages actions to a context so laden with foreign-policy and national-security concerns are obvious.

This case, moreover, is a singularly unsuitable vehicle. Nowhere does the petition address the jurisdictional barriers to this action. And petitioner's departure from the

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[5] Given their disposition of the case, none of the courts below reached qualified immunity or the government's request for dismissal based on the state-secrets privilege. Pet. App. 17a, 422a, 423a-424a.

theory of the complaint makes further review more problematic still. The complaint challenged petitioner's removal to Syria and alleged mistreatment by Syrian officials there—including the claim that respondents removed petitioner to Syria intending or knowing that mistreatment would result—in Counts I through III. Pet. App. 465a-470a. Count IV, by contrast, asserted claims relating to petitioner's alleged mistreatment *while detained in the U.S.*, including the claim that respondents denied him access to U.S. courts. *Id.* at 470a-471a. Petitioner now blends those claims together. Indeed, the denial of access (previously asserted in Count IV), we are now told, is the "most important factor favoring" recognition of a *Bivens* damages action to challenge petitioner's removal to Syria and alleged mistreatment there. Pet. 19. But the denial-of-access claim was rejected by the district court, the court of appeals panel, and the *en banc* court on multiple grounds—all of which are fact-bound and none of which warrant further review. That petitioner's supposedly "most important" reason for review turns out to be a fact-bound and fatally defective denial-of-access claim weighs strongly against review.

I. REVIEW OF PETITIONER'S *BIVENS* CLAIMS RELATING TO MISTREATMENT ABROAD (COUNTS II-III) IS UNWARRANTED

Petitioner first claims that the courts below erred in declining to recognize a *Bivens* action for damages based on his removal to Syria and alleged mistreatment there. The decisions below, however, are correct and consistent with the decisions of this Court and other courts. Further review is unwarranted.

A. The Second Circuit Correctly Declined To Extend *Bivens* To This Highly Sensitive Context

For nearly three decades, this Court has "consistently refused to extend *Bivens* liability to *any* new context or new category of defendants." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001) (emphasis added). See, *e.g.*, *Wilkie* v. *Robbins*, 551 U.S. 537, 562 (2007); *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 (1988); *United States* v. *Stanley*, 483 U.S. 669, 681-684 (1987); *Bush* v. *Lucas*, 462 U.S. 367, 380-390 (1983); *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) (each refusing to extend *Bivens*). In determining whether to extend *Bivens*, this Court pays "particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550. The Second Circuit properly concluded that "special factors sternly counsel hesitation" before recognizing a *Bivens* action in this context—a claim that federal officials, pursuant to federal statutes and federal policy, removed an alien identified as a terrorist to Syria after receiving assurances from Syria that he would not be tortured there. Pet. App. 30a. Indeed, such a suit would inevitably require inquiry into the substance of diplomatic and other communications between the U.S. and foreign governments and touch upon sensitive matters of national security.

1. The Constitution commits "the entire control of" foreign affairs to the political branches. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893). As a result, "foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). Thus, while courts will wade into issues bearing on foreign policy and national security where

"Congress has specifically provided" authority to do so, *Dep't of Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988); cf. *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2262 (2008), there could hardly be a less appropriate arena for the judiciary to enter uninvited.

That, however, is precisely what petitioner requests of this Court. The Second Circuit explained that extending the *Bivens* damages action to this context would necessarily "enmesh the courts" in second-guessing the Executive Branch's judgments on "significant diplomatic and national security concerns." Pet. App. 34a-35a. Suits like this one would not merely require judicial "inquiry into the perceived need for the policy" under which petitioner allegedly was removed to Syria and "the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries." *Id.* at 35a. They would also require extensive discovery into classified "exchanges among the ministries and agencies of foreign countries on diplomatic, security, and intelligence issues." *Id.* at 38a. Indeed, the district court here would be required to consider "what was done by the national security apparatus of at least three foreign countries, as well as the United States." *Id.* at 39a. Petitioner has already argued that it would be "presumptively unconstitutional" for the district court to consider such information *ex parte* and *in camera*. *Id.* at 40a. And the complications that would be posed to U.S. foreign policy and national-security efforts by requiring such sensitive information to be disclosed to *Bivens* plaintiffs in dis-

covery are "too obvious to call for enlarged discussion." *Egan*, 484 U.S. at 529.[6]

Petitioner's damages suit, moreover, challenges the veracity of Syria's "private diplomatic assurance" that petitioner would not be tortured. Pet. App. 42a-43a; p. 9, *supra*. In *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008), this Court confronted a similar executive determination based on "foreign assurances" that a prisoner would not be mistreated following transfer. *Id.* at 2226. Although Congress had provided an otherwise available *statutory* action for *habeas corpus*, the Court ruled that, "[e]ven with respect to claims that detainees would be denied constitutional rights if transferred," "the judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the government's ability to speak with one voice in this area." *Id.* at 2225-2226. *Munaf* thus declined to exercise the statutory jurisdiction Congress had granted. *A fortiori*, federal courts should not *extend* the judicially created *Bivens* damages action where it would raise similar concerns. This Court has previously refused to extend *Bivens* based on far less compelling separation-of-powers concerns. See *Chappell*, 462 U.S. at 300-304 (declining *Bivens* for racial-discrimination claims by military servicemen in part because "the Constitution contemplated that the Legislative Branch have plenary control over * * * the military"); *Stanley*, 483 U.S. at 681 (refusing, for similar reasons, *Bivens* claim for serviceman alleging he was used for human experimentation). Separation-of-

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[6] Indeed, the U.S. moved to dismiss this suit on state-secrets grounds. Gov't C.A. Replacement Br. 13-15. The fact that state secrets would often arise in this context underscores the impropriety of creating a *Bivens* damages claim here.

powers principles overwhelmingly counsel hesitation against extending *Bivens* here. See Pet. App. 36a.

2. Petitioner does not seriously dispute that this case implicates those "special factors." Rather, he urges that extending *Bivens* to this context "raises no issues of foreign policy, national security, or classified information" that would not also arise through "the judicial review" of removal decisions that Congress provided for in the INA. Pet. 12; see *id.* at 24-25. Not so. Here, petitioner would seek discovery into sensitive international negotiations and communications to prove the multination conspiracy he posits; hale former U.S. officials into court; and then ask a jury to render its own decision on the propriety of petitioner's removal. By contrast, a petition for review under 8 U.S.C. § 1252(b)(4) is decided "only on the administrative record." Moreover, the only issue in such review is whether there was "substantial evidence" in the agency-created record.[7] That bears no resemblance to the far-reaching inquiries in which petitioner's suit would "enmesh the courts." Pet. App. 34a-35a.

Indeed, Congress's provision of deferential on-the-record review under the INA underscores the impropriety of judicially implying a wide-ranging *Bivens* damages action.[8] Even if courts *could* craft *ad hoc*

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[7] "[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," and "a decision that an alien is not eligible for admission * * * is conclusive unless manifestly contrary to law." 8 U.S.C. § 1252(b)(4)(A)-(C).

[8] *Bivens* is thus also inappropriate because "alternative, existing process[es] exist for protecting the interest[s]" petitioner presses here. *Wilkie*, 551 U.S. at 550. The INA's judicial-review procedures alone constitute "a convincing reason * * * to resist recognizing a *Bivens* cause of action for petitioner's claims arising from his alleged

protective measures to mitigate the potential intrusion—and even if foreign governments were willing to work with the U.S. absent *ex ante* protection for communications—decisions regarding the creation of causes of action and any correspondingly necessary protective procedures in this sensitive arena must rest with Congress. "[T]he special needs of foreign affairs must stay [the courts'] hand in the creation of damage remedies against * * * foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985); see also *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (refusing *Bivens* action that "would inevitably require judicial intrusion into matters of national security and sensitive intelligence").

The Second Circuit thus did not "err" in relying on "the fact that classified information may be implicated by the suit." Pet. 25. Courts should not unilaterally imply a damages action that would create the risk of disclosing sensitive national security and foreign relations materials, much less justify doing so based on speculation that they can mitigate that self-created risk using other judicially created "tools." *Ibid.* Petitioner cites no authority for the proposition that it is error for a court to "hesitate" before implying a cause of action in favor of a foreign national in a context that would often entail discovery into and disclosure of classified information—

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detention and torture in Syria." Pet. App. 245a (citation and internal quotation marks omitted). Petitioner himself concedes that Congress provided a "[s]pecific [r]emedy" for his grievances in the INA. Pet. 11. That "[s]pecific [r]emedy," however, simply does not include damages. See 8 U.S.C. §§ 1252(a)(2)(D), (a)(4), (b)(9). See *Chilicky*, 487 U.S. at 424-429 (declining to extend a *Bivens* remedy when Congress created an administrative scheme that did not provide for recovery of money damages).

including "the extent of secret diplomatic relationships"—with potentially damaging diplomatic and national-security consequences. Pet. App. 39a, 42a-43a. In such a sensitive context, "Congress is the appropriate branch of government to decide" whether a damages remedy should lie. *Id.* at 49a.[9]

B. Petitioner's Complaints About The Reasoning Below Provide No Basis For Further Review

Petitioner asserts various complaints about the Second Circuit's analysis. But the impropriety of extending *Bivens* here is patent, and this Court "'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Lab.*, 351 U.S. 292, 297 (1956)). In any event, petitioner's criticisms lack merit.

1. Petitioner claims that the Second Circuit erred by describing extensions of *Bivens* as the "rare exception" rather than "the ordinary rule." Pet. 17. But extensions of *Bivens are* the exception: This Court has "consistently refused to extend *Bivens* liability to any new context" for more than 30 years. *Malesko*, 534 U.S. at 68; p. 12, *supra*; see also *Wilkie*, 551 U.S. at 550 ("[I]n most instances we have found a *Bivens* remedy unjustified."). It is petitioner's position—that *Bivens* damages claims

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[9] Petitioner recognizes that Congress is the appropriate forum, having sought investigations by and relief from Congress itself. See *Rendition to Torture: The Case of Maher Arar: Joint Hearing Before the Subcomm. on Int'l Organizations, Human Rights and Oversight of the H. Comm. on Foreign Affairs and the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007). Petitioner's counsel asked Congress to provide "reparations." *Id.* at 95 (statement of David Cole, Esq.). Congress did not do so.

should be the ordinary rule—that is "in sharp conflict with [this Court's] *Bivens* jurisprudence." Pet. 20.

Petitioner's complaint that the Second Circuit "characterized the 'special factors' threshold as 'remarkably low,'" Pet. 20 (quoting Pet. App. 32a), likewise fails. In context, that statement acknowledges that extensions of *Bivens* are rare. The preceding paragraph articulates the governing standard: The "special factors should be *substantial enough to justify the absence of a damages remedy* for a wrong." Pet. App. 31a-32a (emphasis added). That standard, which the Second Circuit applied, is correct.[10]

2. Petitioner also urges that the Second Circuit "erred in treating the 'context' of this action as 'new'" so as to necessitate special-factors analysis of any sort. Pet. 21. But petitioner's failure to cite a single case applying *Bivens* in remotely analogous circumstances—the removal of an alien found to be a threat to national security resulting in alleged mistreatment by a foreign power—proves the context is "new." Petitioner's *ipse dixit* that the relevant context is "torture," *id.* at 22, deprives special-factors analysis of meaning (one could just as easily call the context "constitutional violations"). Petitioner's claim is not that respondents tortured him "themselves while he was in their custody on American soil." *Ibid.* It is that, acting pursuant to federal statutes and federal policy, they removed a Syrian national identified as a terrorist to Syria after receiving assurances

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[10] Petitioner suggests that the "special factors" threshold cannot be "remarkably low" because there were "substantial dissents" in *Bivens*, *Carlson*, and *Davis*. Pet. 20. Those decades-old cases, however, were decided under a more permissive view of "implying private damages actions" from which this Court has long since "retreated." *Malesko*, 534 U.S. at 67 & n.3.

from Syria that he would not be tortured. See pp. 8-10, *supra*. Petitioner's effort to change the *characterization* cannot eliminate the real-world foreign-policy and national-security concerns that "counsel hesitation" with breathtaking clarity in this context.

3. Petitioner also asserts that the Second Circuit erroneously took "[no] account of countervailing factors" in favor of *Bivens*. Pet. App. 32a. According to petitioner, *Wilkie* requires *Bivens* analysis to include "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done." 551 U.S. at 554. But the "weighing" in *Wilkie* concerned whether "it would be good *policy*" to permit a damages action for the harm alleged. *Lucas*, 462 U.S. at 390 (emphasis added). In *Wilkie*, for example, the Court thought it too difficult to "defin[e] a workable cause of action." 551 U.S. at 555. That sort of weighing of "the *merits* of the particular remedy" is a common-law function. *Lucas*, 462 U.S. at 380. But the focus of the "special factors" analysis here is not whether a damages remedy would be good policy. It is "*who* should decide" whether to create that remedy in this particularly sensitive context—Congress or the courts. *Ibid.* (emphasis added). Here, the Second Circuit properly concluded that the foreign-policy and national-security implications dictate that "*Congress* is the appropriate branch of government" to decide whether a remedy is appropriate. Pet. App. 49a (emphasis added).

Petitioner in essence asserts that the Second Circuit, having found that "Congress * * * alone has the institutional competence" to weigh the competing policy arguments regarding a damages action in this context, Pet. App. 9a-10a, should have gone back to decide whether there are countervailing policy concerns that would justi-

fy forging ahead with a new, judicially created remedy anyway, Pet. 15. That position has no basis in logic, much less in *Wilkie*. Petitioner's claim of conflict with court of appeals decisions using "weighing" language like *Wilkie*'s, Pet. 18 (citing *Bagola* v. *Kindt*, 131 F.3d 632 (7th Cir. 1997); *Smith* v. *United States*, 561 F.3d 1090 (10th Cir. 2009); *Wilson* v. *Libby*, 535 F.3d 697 (D.C. Cir. 2008)), fails for the same reason. In none of those cases did the court do what petitioner claims the Second Circuit should have done here—weigh the policy arguments in favor of extending *Bivens* against special factors indicating that the decision is best left to Congress.

In any event, the Second Circuit held that the "special factors should be *substantial enough to justify the absence of a damages remedy* for a wrong." Pet. App. 31a-32a (emphasis added). It thus did conduct weighing. Given the overwhelming foreign-policy and national-security concerns in this context, the Second Circuit did not err in concluding that the concerns were indeed "sufficiently substantial."[11]

4. Finally, petitioner contends the Second Circuit erred in considering "foreign policy and national security

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[11] Urging a conflict with *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), petitioner asserts that the Second Circuit "impermissibly treated as a 'special factor' the fact that [petitioner's] claim was brought 'against senior officials' for implementing a federal 'policy.'" Pet. 22, 23-34 (quoting Pet. App. 34a). But the Second Circuit did not rely on respondents' rank or pursuit of policy by themselves. It found reason to hesitate because senior officials were implementing policy decisions *in the context of "foreign policy and national security,"* arenas in which "'courts have long been hesitant to intrude.'" Pet. App. 35a (quoting *Lincoln*, 508 U.S. at 192). Besides, *Mitchell* was about whether the officers should receive qualified or absolute immunity, 472 U.S. at 513—not whether to extend *Bivens* to a sensitive new context.

concerns" as special factors because Congress has, under the INA, "expressly authorized courts to adjudicate claims that the executive is planning to send an alien to a country where he faces a risk of torture." Pet. 24. He thus claims that a *Bivens* remedy "would *enforce* federal foreign policy, not conflict with it." *Id.* at 25. But *Bivens* damages suits are very different from the remedy Congress provided, see p. 15, *supra*, and this Court long ago gave up attempting to "assist" federal policy by creating new causes of action Congress did not contemplate. See *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001). Besides, creating a damages action here would defy Congress's intent: The "theme" of the INA is "protecting the Executive's discretion from the courts," *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999); that is why Congress channeled actions challenging that discretion into a singular avenue of review. The fact that Congress provided review of removal decisions but decided *not* to offer damages is a "convincing reason" this Court should *not* create a new damages remedy here. See *Chilicky*, 487 U.S. at 424-429.

C. Petitioner's Denial-Of-Access Claims Do Not Support Review

Petitioner repeatedly asserts that a *Bivens* damages remedy for his alleged mistreatment in Syria (requested in Counts II and III) is necessary because respondents allegedly "obstructed [his] access to the judicial remedy provided by Congress to prevent torture," *i.e.*, the INA's review mechanisms. Pet. i; see also *id.* at 11-15. That denial of access, petitioner claims, is the "most important factor favoring" *Bivens*' expansion here. *Id.* at 19. But petitioner asserted an access-to-courts theory as a stand-alone claim in Count IV of his complaint. And each of the courts below rejected that claim—for multiple reasons.

The fact that the petition invokes a fact-bound theory, discredited by all of the courts below, as the "most important factor favoring" creation of a new *Bivens* action for his removal and alleged mistreatment by Syrian officials in Syria, *ibid.*; see also *id.* at i, 11-14, weighs against further review.

1. As explained in greater detail below, the courts below properly rejected petitioner's access-to-courts claim because the complaint failed to allege the *personal* involvement of each respondent, as required by *Twombly* and *Iqbal*. See pp. 31-33, *infra*. Petitioner seeks damages from respondents. But nowhere does petitioner explain why *a denial-of-access claim* should render *respondents* liable for damages for his removal, in an otherwise unavailable *Bivens* action, where he did *not* properly allege that *respondents were responsible for* that denial of access. Petitioner, moreover, refused an opportunity to re-plead to fix that defect.

2. The district court and the court of appeals panel, moreover, both concluded that petitioner's denial-of-access claim fails under this Court's decision in *Christopher* v. *Harbury*, 536 U.S. 403 (2002). *Harbury* held that, where a *Bivens* action alleges "the loss of an opportunity to seek some particular order of relief," the identity of the underlying claim that was lost "is an element that must be described in the complaint." 536 U.S. at 414, 415. In this case, the complaint asserted that respondents "interfered with [petitioner's] access to lawyers and the courts" such that he could not "petition the courts for redress of his grievances." Pet. App. 471a. But petitioner failed to "state the underlying claim" he was prevented from asserting. 536 U.S. at 417. The district court therefore gave petitioner an opportunity to re-plead to "articulate more precisely the judicial relief

he was denied." Pet. App. 421a, 426a. Petitioner refused that opportunity, electing to "stand on the allegations of his original complaint." *Id.* at 20a; C.A. Spec. App. 92. The court of appeals panel agreed that the complaint was fatally deficient under *Harbury*. Pet. App. 264a-265a.[12] Petitioner nowhere asserts those fact-bound rulings warrant review.

The facts as pleaded, moreover, do not make out a denial-of-access claim of any sort. By September 27, petitioner was on notice he might be removed to Syria and was served, on October 1, with a formal notice that he had *five days* (to October 6) to respond or face removal. Pet. App. 585a. Petitioner contacted his family that same day; met with a Canadian Consulate representative on October 3; and met with his attorney on October 5. *Id.* at 455a-456a. But his attorney, with full notice petitioner could be removed as soon as October 6, never sought relief either before that deadline or anytime after petitioner's removal on October 8. *Id.* at 458a; see 8 U.S.C. § 1252(b)(1) (deadline for filing petition for review); cf. *Lopez* v. *Gonzales*, 549 U.S. 47, 52 n.2 (2006) (alien may apply for cancellation of removal after deportation).

3. Finally, petitioner's theory makes no sense. Petitioner nowhere explains why the claim that he was denied access to the courts should justify giving him a *Bivens* damages remedy for the operative conduct alleged in

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[12] On appeal, petitioner claimed that respondents "compromised his right to seek a court order" under the INA "'enjoin[ing] his removal to a country that would torture him, as a violation of FARRA and the [CAT].'" Pet. App. 264a (quoting Pl. C.A. Br. 34). But the panel properly rejected the attempt to re-plead the complaint in an appellate brief. The "complaint makes no mention of FARRA, the CAT, or the possibility of injunctive relief" under the INA. Pet. App. 264a.

Counts II and III. The remedy (if any) for denial of access would be a *Bivens* action for the denial of access *itself*—the claim petitioner briefly attempted to assert in Count IV—not the creation of a *Bivens* action to seek damages from officials for alleged mistreatment abroad.

This Court's decision in *Harbury* makes that clear. In *Harbury*, too, the plaintiff claimed that U.S. officials arranged for the victim's torture abroad and then thwarted access to the courts to prevent it. The D.C. Circuit rejected the claim that U.S. officials had violated the Fifth Amendment by ordering, conspiring in, and participating in that conduct because Due Process claims are not viable where the primary "conduct at issue * * * — * * * torture [of a foreign national]—occurred outside the United States." *Harbury* v. *Deutch*, 233 F.3d 596, 603 (D.C. Cir. 2000). This Court reviewed Harbury's claim that federal officials violated the Constitution by impeding access to federal courts. But the Court did not hold—as petitioner would have it—that the denial of access should permit an otherwise impermissible *Bivens* action for the mistreatment of an alien abroad. Instead, the Court addressed whether the plaintiff had stated a stand-alone claim for violating her right of access to the courts (like the one petitioner asserted in Count IV). 536 U.S. at 413. The courts below did not err in addressing the claims in the same manner here. *Harbury*, moreover, underscores a further reason for denying review—other threshold issues, like qualified immunity, preclude relief.[13]

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[13] Respondents are entitled to qualified immunity at the threshold unless the unconstitutionality of the alleged conduct was so "clearly established" that "it would be *clear* to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added). Here, no *clearly*

D. Threshold Jurisdictional Issues Make This Case An Unsuitable Vehicle

There is yet another reason this case is a poor vehicle—the unaddressed jurisdictional issues that stand between this Court and the *Bivens* issues petitioner raises. By its terms, the INA deprives the courts of jurisdiction over "*any cause or claim* by or on behalf of any alien *arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders* against any alien under this chapter," "[e]xcept as provided" by the INA itself. 8 U.S.C. §1252(g) (emphasis added). The INA further provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from* any action taken or proceeding brought *to remove an alien* from the United States * * * shall be available *only* in judicial review of a final order under [8 U.S.C. §1252(d)]." 8 U.S.C. §1252(b)(9) (emphasis added). Those provisions "emphatically provide[] that federal courts lack jurisdiction" over suits seeking review of removal actions—including determinations under the Convention Against

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established violation occurred: Petitioner was allegedly injured abroad, and this Court has made clear that the Due Process Clause does not apply to aliens abroad. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Johnson* v. *Eisentrager*, 339 U.S. 763, 784-785 (1950). *Harbury* held that, even if the alien claims a "conspiracy" in the U.S. to injure him abroad, due process still is not violated, because the "location of the *primary constitutionally significant conduct* at issue"—"the torture"—is dispositive. 233 F.3d at 604 (emphasis added); see *Linnas* v. *INS*, 790 F.2d 1024, 1031 (2d Cir. 1986) (removing alien to foreign nation knowing he will be unlawfully executed there not unconstitutional). *Harbury* dispels any notion that there is "clearly established" law that a supposed conspiracy to subject an alien to mistreatment abroad violates the Fifth Amendment.

Torture ("CAT")—unless the claims are raised under the review provisions of the INA itself. Gov't C.A. Replacement Br. 26.

Petitioner's *Bivens* claims relating to his mistreatment abroad (Counts II and III) clearly "aris[e] from" his removal. Petitioner's theory is that respondents conspired "to remove [petitioner] to Syria" for coercive interrogation "in direct contravention of the [CAT]." Pet. App. 440a (complaint); see *id.* at 466a, 468a (*Bivens* based on "deport[ation] * * * to Syria"); *id.* at 446a (respondents "failed to consider * * * CAT"). Petitioner thus "challenge[s] [petitioner's] removal and the CAT determination that he was not likely to be tortured in Syria." Gov't C.A. Replacement Br. 27. Because those claims arise from his removal and question the validity of determinations incorporated into the removal orders, 8 U.S.C. §§ 1252(b)(9) & (g) preclude their assertion outside the procedures established by the INA itself. *Id.* at 27-28; see also *Sissoko* v. *Rocha*, 509 F.3d 947, 950-951 (9th Cir. 2007); *Foster* v. *Townsley*, 243 F.3d 210, 214-215 (5th Cir. 2001).

That threshold jurisdictional barrier weighs against review with special force here. Neither the decision below nor the decision of any other court of appeals has addressed whether "the INA bar defeats [subject-matter] jurisdiction" over an alien's *Bivens* claim in similar circumstances. Pet. App. 25a.[14] Petitioner asks this

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[14] The Second Circuit declined to address jurisdiction because "the case must be dismissed at the threshold for other reasons." Pet. App. 25a; see *id.* at 215a-227a. Generally, courts must address subject-matter jurisdiction. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998). This Court surely could not resolve any legal issue *in petitioner's favor* without first deciding jurisdiction. See *ibid.*

Court to be the first. But this Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). "Prudence * * * dictates awaiting * * * the benefit of * * * lower court opinions squarely addressing the question." *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992). Petitioner may argue that he should be able to raise a claim "arising from" his removal under *Bivens* because respondents interfered with his access to statutory remedies. But, as explained above, the lower courts rejected petitioner's access-to-courts claim on the merits. See pp. 6-8, *supra*. And petitioner has never sought INA review (invoking equitable tolling or otherwise). Petitioner cannot rely on a failed access-to-courts claim to evade express jurisdictional limits, particularly where (as here) that fact-bound access-to-courts claim does not itself warrant review.

II. REVIEW OF PETITIONER'S TVPA CLAIM IS UNWARRANTED

The TVPA creates a damages action against anyone "who, under actual or apparent authority, or color of law, of any foreign nation * * * subjects an individual to torture." 28 U.S.C. § 1350 note § 2(a)(1). The TVPA thus applies only to defendants acting under color of *foreign law*. Because respondents—U.S. officials, in U.S. government buildings, exercising authority pursuant to an Act of Congress in pursuit of federal interests—plainly were acting under color of U.S., not Syrian, law, the TVPA claims were properly dismissed. Pet. App. 19a.

1. As the Second Circuit observed, the "traditional definition of acting under color of [a jurisdiction's] law requires that the defendant * * * have exercised power possessed by virtue of [that] law and made possible only because the wrongdoer is clothed with the authority of [that] law." Pet. App. 17a-18a (quoting *West* v. *Atkins*,

487 U.S. 42, 49 (1988)) (some quotation marks omitted).[15] Here, petitioner did not "adequately allege that the defendants possessed power under Syrian law, and that the offending actions (*i.e.*, [petitioner's] removal to Syria and subsequent torture) derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power." *Id.* at 18a. To the contrary, far from acting under color of Syrian law, respondents "are alleged to have acted under color of *federal* [law], * * * in accordance with alleged *federal* policies and in pursuit of the aims of the *federal government* in the international context." *Id.* at 19a (emphasis added); see *id.* at 444a-448a 466a-469a.[16]

Petitioner claims the Second Circuit's application of "under color of law" here "conflicts with decisions of this Court and other courts of appeals." Pet. 27. Not so. Every court to have considered this issue has concluded that U.S. officials, pursuing federal policy, under federal statutes, act under color of U.S. rather than foreign law for TVPA purposes. For example, in *Harbury* v. *Hayden*, 444 F. Supp. 2d 19, 41-43 (D.D.C. 2006), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008), *cert. denied* 129 S. Ct. 195 (2008), the district court held that CIA officers cooperating with the Guatemalan military acted under color of U.S. law because they were "within the scope of their

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[15] *West* involved an action under 42 U.S.C. §1983. See 487 U.S. at 49. The TVPA's legislative history suggests that "[c]ourts should look to" cases decided under §1983 in "construing [the TVPA's] 'color of law'" requirement, H.R. Rep. No. 102-367, at 5 (1991), *i.e.*, in deciding whether actions were private or governmental.

[16] See Statement By Pres. George H. W. Bush Upon Signing H.R. 2092, 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) ("I do not believe it is the Congress' intent that [the TVPA] should apply to United States * * * law enforcement operations, which are always carried out under the authority of the United States.").

employment serving the United States" and "carrying out the policies and directives of the CIA." Accord *Schneider* v. *Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004) (U.S. national security adviser "was most assuredly acting pursuant to U.S. law * * * despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law"), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005). Petitioner does not point to "a single case" holding "that a U.S. agent serving the interests of the United States and acting within his or her employment can be held liable pursuant to the TVPA." *Hayden*, 444 F. Supp. 2d at 42.[17]

Petitioner claims that the standard applied below conflicts with this Court's §1983 decisions. Pet. 26-29. But the standard the Second Circuit applied—that, to act under color of foreign law, respondents must "have exercised power possessed by virtue of [that] law and made possible only because the wrongdoer is clothed with the authority of [that] law," Pet. App. 17a-18a—is a direct quote from this Court's decision in *West* v. *Atkins* (a § 1983 case). See Pet. App. 17a-18a. It is also the "*traditional definition* of acting under color of * * * law." 487 U.S. at 49 (emphasis added). Petitioner can point to cases applying different verbal formulae. But, as this Court explained in *Brentwood Academy* v. *Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), there are a "variety" of tests, *id.* at 296, and the

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[17] The only TVPA case petitioner cites is *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005). But the defendant there was a corporation, not a federal official pursuing federal policy. As a result, the only question was whether the plaintiff had alleged government action at all, not whether a U.S. official was acting under color of U.S. or foreign law. See *id.* at 1247-1249

propriety of any particular test requires "normative judgment" based on context, *id.* at 295. Here, "normative judgment" called for *West*'s "traditional test."

Petitioner's claim (Pet. 27, 29) that the Second Circuit should have applied a "willful participation in joint action" standard from *Dennis* v. *Sparks*, 449 U.S. 24, 27 (1980), and other cases is mistaken. This Court has since "refined" the "vague 'joint participation' test" and cautioned that it is inappropriate to "fall[] back on" "general language about 'joint participation' as a test" even under § 1983. *Sullivan* v. *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. 40, 57-58 (1999); see also *id.* at 62 (*Sullivan* "clean[ed] up and rein[ed] in" prior "'state action' precedent[s]") (Ginsburg, J., concurring). And *Dennis* concerned whether the defendants, private individuals who bribed a judge, acted under color of state law. 449 U.S. at 27-28. As *Brentwood* explains, the proper formulation and application of the test is context-specific. See 531 U.S. at 296. *Dennis* thus did not purport to establish the test governing the context and question here—whether *federal officials* acting within the scope of their federal employment within the U.S. acted *under color of foreign law.*[18]

As the district court recognized, state and federal officers "act[] under a legal regime established by our constitution and our well-defined jurisprudence in the domestic arena." Pet. App. 371a. The law recognizes

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[18] Moreover, courts routinely require more than "joint action" for finding that a federal official acts under color of state law in the § 1983 context. For example, in *Kletschka* v. *Driver*, 411 F.2d 436 (2d Cir. 1969), the Second Circuit required proof that the federal-official defendants acted "under the control or influence of the State defendants." *Id.* at 449. Here, there is no claim the federal officials acted under Syrian control.

their reciprocal authority. See, *e.g.*, *United States* v. *Garrett*, 172 F. App'x 295, 298 (11th Cir. 2006); *United States* v. *Janik*, 723 F.2d 537, 548 (7th Cir. 1983). The "national and State systems are to be regarded as ONE WHOLE." The Federalist No. 82. But the United States and foreign nations—here, Syria—are in no sense "one whole." "Thus, it is by no means a simple matter to equate actions taken under the color of state law in the domestic front to conduct undertaken under color of foreign law." Pet. App. 371a. Petitioner identifies no case that has held that a U.S. official acted under color of foreign law, much less a decision that does so in conflict with the decision below.[19]

III. THE DENIAL-OF-ACCESS CLAIM (COUNT IV) DOES NOT WARRANT REVIEW

Finally, petitioner challenges the dismissal of his denial-of-access claim (Count IV). See Pet. 30. That fact-bound claim warrants no further review.

In *Iqbal*, this Court held that a plaintiff asserting a *Bivens* claim "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." 129 S. Ct. at 1948. The courts here agreed that petitioner's complaint did not do so: Petitioner "fail[ed] to specify culpable action taken by any single defendant, and [did] not allege the 'meeting of the minds' that a plausible conspiracy claim requires." Pet. App. 21a; see *id.* at 423a. Challenging that ruling, petitioner recounts his allegations at length and recites

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[19] Petitioner also claims a conflict with *Hindes* v. *FDIC*, 137 F.3d 148 (3d Cir. 1998), see Pet. 29, but the Second Circuit acknowledged that *Hindes*' conspiracy-based standard might apply in some circumstances. See Pet. App. 18a-19a. The court simply found that petitioner's allegations of conspiracy came up short. *Ibid.*

the inferences he wants drawn. See Pet. 30-34. Whether petitioner's complaint meets *Iqbal*'s requirements, however, is precisely the sort of case-specific dispute that rarely warrants this Court's review. See *Gonzalez* v. *Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., concurring). Petitioner half-heartedly asserts that the standards employed below "conflict with this Court's decisions" in *Twombly* and *Iqbal*. Pet. 34. But the Second Circuit specifically cited and applied both cases in assessing petitioner's pleadings. See Pet. App. 20a. Petitioner's claimed "misapplication of a properly stated rule of law" does not warrant review. S. Ct. R. 10. Indeed, having refused the district court's "invit[ation] * * * to re-plead the claim" to cure the deficiencies, Pet. App. 20a, petitioner is ill-positioned to demand that this Court give him relief he could have provided himself by re-pleading.

Besides, the court of appeals' decision was correct. To give but one example, petitioner nowhere identifies anything Thompson did to deny petitioner access to the courts. The sole concrete act petitioner attributes to Thompson is the determination that removing petitioner—then an adjudicated member of al Qaeda—to Canada would be "prejudicial to the United States" within the meaning of 8 U.S.C. § 1231(b)(2)(C)(iv) given the porous 5,525-mile U.S.-Canadian border. See p. 3 & n.2, *supra*. But that facially sensible determination, which by statute Thompson, as acting Attorney General, was required to make, hardly raises an inference of conspiracy to prevent access to the courts. Petitioner's remaining allegations likewise show only that each re-

spondent performed the role he was supposed to perform under the INA.[20]

Petitioner's claim, moreover, also fails for the reasons given above. Two courts have recognized that his denial-of-access claim is fatally defective under *Harbury*. See pp. 22-23, *supra*; Pet. App. 264a-265a, 420a. And the facts as pleaded do not make out a denial-of-access claim in any event. See p. 23, *supra*. Further review is unwarranted.

CONCLUSION

The petition should be denied.

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[20] Petitioner errs in claiming (Pet. 32-33) a conflict between the court of appeals' holding that personal involvement was not sufficiently pleaded and its "affirm[ance of] *the district court's conclusion* that [petitioner] sufficiently alleged personal jurisdiction." Pet. App. 6a-7a (emphasis added). For the denial-of-access claim (Count IV), the district court found personal jurisdiction was *not* established, dismissing that count precisely because "the complaint lacks the requisite amount of personal involvement needed * * * to establish personal jurisdiction." *Id.* at 423a.

Respectfully submitted.

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MAY 2010

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(10)

No. 09-923

Supreme Court, U.S.
FILED
MAY 25 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

MAHER ARAR,
PETITIONER

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTRODUCTION

Respondents' opposition seeks to deflect attention from the grave allegations presented here—that respondents intentionally sent a Canadian citizen to Syria to have him arbitrarily detained and questioned under torture, and intentionally blocked his access to the congressionally mandated judicial review designed to prevent such actions. To deny petitioner Maher Arar a remedy is to reward federal officials for flouting one of the most fundamental prohibitions that our law recognizes—the prohibition on torture—and for evading the judicial check that Congress established. The court of appeals reached that result by adopting an unprecedented threshold test that virtually ensures that a *Bivens* action will never proceed, and by rejecting Congress's directive that the Torture Victim Protection Act be applied to all who act under color of foreign law in subjecting an individual to torture.

I. This Case Directly Presents the Question Whether Federal Officials Can, With Impunity, Intentionally Subject a Person to Torture and Obstruct His Access to Congressionally-Mandated Judicial Review Designed to Prevent Torture.

Respondents' oppositions read as though the case does not involve allegations of intentional conspiracy to torture and obstruction of access to congressionally guaranteed judicial review. The Solicitor General's opposition on behalf of John Ashcroft

and the official capacity respondents acknowledges that federal law and policy prohibit torture under all circumstances, but argues that the issues here have nothing to do with torture, and involve only three narrow questions regarding *Bivens* liability, the interpretation of the Torture Victim Protection Act, and the sufficiency of Arar's pleading. Ashcroft Opp. 9-10. The other respondents repeatedly assert, *without any record support and contrary to the facts alleged*, that U.S. officials obtained assurances from Syria—a country that the State Department has consistently found to use torture—that Arar would not be tortured. Thompson Opp. 5, 9, 12, 14, 18-19. In addition, the Solicitor General maintains that Arar's suit for damages is improper because he failed to pursue the statutory remedies that Congress provided to ensure that foreign nationals are not removed to countries where they face a risk of torture. Ashcroft Opp. 19-22.

Each of these statements is misleading or false. First, this case is most assuredly about torture—specifically, about whether the absolute federal prohibition on torture can be violated with impunity. The complaint alleges that respondents intercepted Arar, a Canadian citizen on his way home to Canada, kept him out of court so that he could not challenge their actions, and forcibly delivered him to Syrian security service officials for the purpose of having him arbitrarily detained and tortured. If U.S. officials are free to deliver a man to be tortured without any legal accountability, the prohibition on torture found in the Constitution and federal statutes is empty symbolism.

Second, this is not a case about mistaken reliance on assurances. On review of a motion to dismiss, the case must be decided solely on the allegations in the complaint—and the complaint says nothing about assurances. Respondents could have introduced evidence about any purported assurances that they may have received and then sought summary judgment. But they chose not to do so, and cannot now avoid review by adverting to "assurances" not part of the record. The complaint plausibly alleges that respondents intentionally conspired to send Arar to Syria to be tortured, and therefore the question is whether that allegation gives rise to a cognizable *Bivens* claim, not what factual defenses respondents might assert.

Had respondents properly raised the issue of assurances, the record would have included substantial evidence that the asserted "assurances" provided no assurance at all. The Department of Homeland Security's Inspector General reported, for example, that the INS concluded that returning Arar to Syria would more likely than not result in his torture.[1] He noted that federal officials followed none of the traditional channels for seeking assurances.[2] He con-

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[1] DEP'T OF HOMELAND SECURITY'S OFFICE OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA, OIG-08-18, at 22 (Mar. 2008, publicly released June 5, 2008), *available at* https://www.hsdl.org/?view&doc=90806&coll=public ("OIG Report").

[2] *See* DEP'T OF HOMELAND SECURITY'S OFFICE OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA (REDACTED) ADDENDUM, OIG-08-18, at 3-4 (Mar. 2010), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIGa_08-

cluded that the assurances were "ambiguous regarding the source or authority purporting to bind the Syrian government to protect Arar," OIG Report at 5, and that their validity "appears not to have been examined." *Id.* at 22. Indeed, the Inspector General could not exclude the possibility that Arar was sent to be interrogated under unlawful conditions, the very possibility that Arar alleges actually occurred. *See* Pet. 14 n.7.[3]

Third, and most importantly, respondents' invocation of statutory immigration remedies as a basis for dismissing Arar's *Bivens* claims ignores a critical fact: respondents did everything within their power to ensure that Arar could *not* seek the statutory remedies that Congress prescribed. Holding

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18_Mar10.pdf ("OIG Report Addendum"). *See also* OIG Report at 26-27.

[3] The same flaw infects the Thompson respondents' contention—made for the first time in their opposition to the petition for certiorari—that Thompson chose not to return Arar to Canada, his home country, because Canada has a porous border with the United States. Thompson Opp. 2, 3 n.2, 32. This explanation is not part of the record. Moreover, unless respondents knew Arar would be arbitrarily detained by Syria, nothing would have stopped Arar from leaving Syria and returning to Canada and its assertedly porous borders. But again, this assertion was never made part of the record, was not subject to adversarial testing, and therefore is not admissible in reviewing the grant of a motion to dismiss.

Respondents' claim that Arar only "now" denies membership in Al Qaeda is also false. Thompson Opp. at 3. Arar's complaint squarely asserts that he is not involved with Al Qaeda or any other terrorist organization, and that he vehemently denied any affiliation with terrorists groups while interrogated in New York. Pet. App. 444a, 453a-454a.

him in solitary confinement, they initially denied his requests for a lawyer and to call his family. Then, as soon as Arar was able to see a lawyer, they hastily scheduled his "fear of torture" proceeding for late the next night—a Sunday night—so that his lawyer could not participate. They lied to Arar that night, telling him that his lawyer had chosen not to participate. They lied to the lawyer about Arar's whereabouts the next day, claiming he was taken to New Jersey, when in fact he was still in New York, as they prepared to transport him to Syria. They waited to serve Arar with his final order of removal—a prerequisite to judicial review—just before they placed him, shackled and bound, on a federally chartered jet to Jordan, where he was taken to Syria and locked up in solitary confinement for most of his year-long captivity.[4] They never served the order on Arar's attorney, as required by their own regulations, 8 C.F.R. § 292.5(a) (2002), or informed her that Arar had been sent to Syria. *See* Pet. 4-6. These extraor-

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[4] The Thompson respondents claim that Arar took "no action" after receiving a notice on October 1, 2002, that he might be summarily removed within five days. Thompson Opp. 2. In fact, Arar sought to consult a lawyer and a consular officer, and objected that he should not be sent to Syria because he would be tortured. As Arar has maintained throughout the proceedings, he never sought admission to the United States, but was only trying to change planes on his way home, and "removal" to Canada would have gotten him home. The October 1 notice did not inform Arar that he would be removed to Syria. OIG Report at 15. A Canadian consular official assured Arar that he would not be sent to Syria, as he was a Canadian citizen. Pet. App. 456a. *See also* OIG Report at 22 ("The usual disposition of a removal action would have involved removing Arar to Switzerland or transporting him to a nearby country where he resided and had citizenship, not to transport him to a nation where his proof of citizenship had lapsed.").

dinary measures reflect what Arar has alleged—a conscious design to keep him from the courts that would have protected him. Indeed, respondents have never suggested any other explanation.

Congress assigned the courts a central role in promoting adherence to the federal prohibitions on torture and refoulement. Yet respondents intentionally obstructed Arar from accessing that remedy so that they could subvert those very prohibitions. Respondents maintain that the separation of powers requires the courts to stay their hand here. On the contrary, *Bivens* relief is essential precisely to reinforce the congressionally established judicial check that executive officials successfully evaded.[5] To dismiss Arar's case at the threshold is to reward federal officials for getting away with torture—and for flouting Congressional will.

II. The Unprecedented *Bivens* Standard Employed by the Court of Appeals Conflicts with Decisions of This Court and Other Circuits.

Respondents only half-heartedly attempt to defend the court of appeals' unprecedented standard for determining whether a *Bivens* remedy should be recognized. Instead, respondents principally argue that the Court should overlook the court of appeals'

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[5] Respondents also argue that because the statutory review provisions contain no damages remedy, a *Bivens* remedy for torture is precluded. Ashcroft Opp. 20-21. But statutory review, if successful, would have prevented the torture, making damages unnecessary. Congress could not have intended that government officials should be free to deny access to its review procedure altogether.

reasoning, and attempt to defend the decision on other grounds.

The court of appeals constructed out of whole cloth a threshold hurdle for *Bivens* claims that Bivens himself could not have satisfied. It held that in assessing whether to recognize a *Bivens* claim, courts should give *no consideration whatsoever* to factors in favor of recognizing a *Bivens* remedy, and should deny such claims if there is *any* reason for hesitation or doubt. Pet. App. 31a-32a. This one-sided, hair-trigger approach would effectively overrule *Bivens*, for reasonable minds will always be able to identify *some* reason for hesitation, and if no considerations in favor of a claim may even be weighed in the balance, a negative result is preordained.

The court of appeals' explicit refusal to consider factors weighing in favor of a *Bivens* claim directly conflicts with *Wilkie v. Robbins*, 551 U.S. 537 (2007), which held that *Bivens* requires "weighing reasons *for and against* the creation of a new cause of action, the way common law judges have always done." *Id.* at 554 (emphasis added). The Solicitor General maintains that there is no need to consider positive factors because they are the same in every case—providing a remedy for a constitutional violation. Ashcroft Opp. 17-18. But the Court in *Wilkie* said and did otherwise, expressly calling for the weighing of positive as well as negative factors, and then undertaking precisely that inquiry. 551 U.S. at 555-62.

The *Wilkie* Court first carefully assessed the reasons *for* granting Robbins a remedy. It found that

Robbins was seeking a remedy for the government's overly aggressive "course of dealing" with him, and that while Robbins did have other state and federal remedies available, these remedies were not fully adequate. 551 U.S. at 555. The Court expressly deemed this consideration to weigh in *favor* of recognizing a claim. *Id.* It then found, however, that the negative factors outweighed the positive. *Id.* at 561-62. By contrast, the court of appeals here engaged in no weighing whatsoever, and no consideration of positive factors.[6]

The Solicitor General does not even try to defend the court of appeals' erroneous statement that *any* reason for hesitation is an absolute bar, and instead urges the Court to overlook it because the court of appeals twice indicated that it thought the special factors here "strongly" counseled hesitation. Ashcroft Opp. 18-19. But under the court's unprecedented standard, virtually any ground for doubt would "strongly" counsel hesitation. Moreover, the court insisted that its threshold test was "integral to the holding in this in banc case, because we do not take account of countervailing factors and because

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[6] The Thompson respondents argue that courts need not consider any positive factors because the "special factors" analysis addresses "not whether a damages remedy would be good policy," but whether Congress or the courts should decide to create a remedy. Thompson Opp. 19. But in *Wilkie* itself, the Court identified the "special factors" analysis as an integral part of the court's "common-law" weighing inquiry. 551 U.S. at 550. The determination that Congress rather than the Court should decide to create a remedy is not a distinct inquiry, but simply the end result of *any* decision declining to recognize a *Bivens* claim, for it is always open to Congress to create a remedy where the Court has not

we apply the standard we announce." Pet. App. 32a. Thus, the court itself rejected the Solicitor General's suggestion that its erroneous standard was a mere "statement[] in [an] opinion." Ashcroft Opp. 18 (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam)); Thompson Opp. 17.

Respondents have cited no other decision applying as one-sided or restrictive a standard as the court of appeals did here. Without saying so, the court effectively eviscerated *Bivens*. That is beyond the court's authority. For that reason alone, its decision warrants certiorari.

III. Arar's Allegations of Torture and Obstruction of Arar's Access to Remedies Prescribed by Congress Are Critical Factors Supporting *Bivens* Relief Here.

Had the court of appeals not artificially closed its eyes to factors favoring a *Bivens* remedy, it would have had substantial positive factors to consider. The fact that respondents allegedly subjected a man in their custody to torture is itself an extraordinarily strong factor supporting a remedy under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). One of the Court's earliest *Bivens* decisions held that damages were an appropriate remedy for abuse of a federal detainee, even where the allegations did not rise to the level of torture. *Carlson v. Green*, 446 U.S. 14 (1980). This Court has identified torture as the paradigmatic violation of substantive due process. *See Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that stom-

ach pumping violates substantive due process as "too close to the rack and screw"). International law treats the prohibition on torture as a non-derogable *jus cogens* norm, the highest form of legal prohibition recognized in international law, reserved for the most egregious wrongs, such as genocide. *See, e.g.*, *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). As the Solicitor General notes, torture is absolutely forbidden by both federal statute and policy. Ashcroft Opp. 9. And the State Department has represented that the United States meets its obligations under the Convention Against Torture (CAT) in part by recognizing *Bivens* actions against federal officials who torture.[7] In light of the gravity of torture and our obligations to refrain from it, the need for deterrence, which this Court has previously identified as a positive factor, takes on enhanced weight here. *See, e.g.*, *Bivens*, 403 U.S. at 395-97; *Carlson*, 446 U.S. at 20-21; *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001).

That respondents are alleged to have violated such a fundamental prohibition is surely a strong factor favoring a damages remedy—particularly where, as here, and as in *Bivens*, *Carlson*, and *Davis v. Passman*, 442 U.S. 228 (1979), this is the only remedy Arar can obtain from the federal respondents. If the court of appeals' decision stands, fed-

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[7] *See* U.S. Dep't of State, *United States Written Response to Questions Asked by the United Nations Committee Against Torture*, pt. 5 (bullet-point 5) (Apr. 28, 2006), *available at* http://www.state.gov/g/drl/rls/68554.htm; U.S. Dep't of State, *United States Report to the United Nations Committee Against Torture*, ¶ 51 (bullet-point 5), ¶ 274, U.N. Doc. CAT/C/28/Add/5 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf.

eral officials who, for purposes of this motion to dismiss, must be presumed to have intentionally subjected Arar to torture, will escape all accountability.

The second factor that strongly supports *Bivens* relief is the fact that, as part of their conspiracy, respondents intentionally obstructed Arar's access to the remedies Congress provided to forestall torture. Respondents do not dispute that had Arar been able to get to court, he could have sought redress in the form of an order barring respondents from delivering him to his torturers in Syria. Instead, respondents argue that the (entirely theoretical) availability of these alternative avenues supports preclusion of a *Bivens* claim now. But this argument ignores the allegations, recited above, *supra* pp. 4-6, that respondents obstructed those very avenues of review.[8]

Respondents object that Arar's access to court claim was pleaded with insufficient particularity. In

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[8] Respondents' contention that certiorari should be denied because the district court lacked jurisdiction—a position rejected by the district court and not reached by the court of appeals—is meritless. To hold that Congress's immigration review statutes preclude jurisdiction here would require the Court to conclude that in establishing judicial review of removal decisions, Congress intended to preclude damages actions for torture, arbitrary detention, and denial of access to court where executive officials affirmatively obstruct foreign nationals from pursuing the very avenues for judicial review that Congress established. There is no support in the statute or its legislative history for that perverse result. On the contrary, a *Bivens* action here would reinforce Congress's statutory scheme, by preventing federal officials from evading with impunity the congressional bans on torture and refoulement and the congressionally established procedures for judicial review.

fact, Arar identified a specific and detailed chronology of events, recited above, *supra* pp. 4-6, that is susceptible to one and only one explanation—respondents' conscious intent to ensure that Arar's removal for torture not be reviewed by a court. As Judge Parker noted in dissent, to require anything more of a person who was held in solitary confinement until he was removed would be entirely unreasonable. Pet. App. 145a-146a. And while Arar did not seek to replead his access-to-court claim, to do so would have been futile. The district court ordered him to amend without reference to his being removed to Syria for torture—but the claim that respondents obstructed him from adjudicating was precisely his claim that sending him to Syria to be tortured would violate the CAT.[9]

Moreover, whether or not Arar's access-to-court claim stands as an independent constitutional claim, his allegations concerning respondents' interference with his ability to seek judicial intervention support his *Bivens* claim for torture and arbitrary detention. The alleged obstruction was part and parcel of the plan to subject him to torture and arbitrary detention. Having decided to send Arar to Syria so that security forces there could arbitrarily detain and torture him, respondents had to keep Arar out of court—because no court would allow his removal to Syria under these circumstances. The fact that re-

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[9] Respondents also contend that the access-to-court claim fails because Arar did not identify the legal claim he was foreclosed from pursuing. Ashcroft Opp. 27. In fact, Arar's complaint specifically identified the foregone claim in its opening paragraph—his right under the Convention Against Torture not to be removed to Syria, where he faced a risk of torture. Pet. App. 440a.

spondents furthered their conspiracy to torture Arar by keeping him away from the judicial review that Congress prescribed strongly supports *Bivens* relief, because such relief would ensure that federal officials are not free to evade congressionally prescribed review procedures designed to prevent removal to torture in the first place.

A third factor strongly favoring *Bivens* is the fact—undenied by respondents—that had these officials tortured Arar while he was in custody in Brooklyn, a *Bivens* action would now be available. *See Carlson v. Green*, 446 U.S. 14. There is no justification for denying Arar a *Bivens* claim simply because respondents instead intentionally delivered him to Syria for the purpose of subjecting him to the same abuse there. As Judge Sack stated in his dissent, "we do not think that the question whether the defendants violated Arar's substantive due process rights turns on whom they selected to do the torturing, or that such 'outsourcing' somehow changes the essential character of the acts within the United States to which Arar seeks to hold the defendants accountable." Pet. App. 96a-97a.[10]

Because the court of appeals artificially precluded any consideration of factors favoring *Bivens*

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[10] As the Canadian Minister of Foreign Affairs has recently reiterated, at no point did Canada oppose Arar's entry into Canada. *See* May 24, 2010 Request by Petitioner to Lodge Letter from Canada's Minister of Foreign Affairs. Respondents do not dispute that the court of appeals' statement to the contrary—that Canada was "unwilling to receive him," Pet. App. 48a—was utterly false. *See* Pet. 9 n.5.

review, it took no account of any of these factors in assessing whether a *Bivens* remedy should lie.[11]

IV. None of the "Special Factors" Cited by Respondents or the Court of Appeals Warrants Preclusion of the *Bivens* Claims Here.

Respondents argue that the court of appeals correctly cited national security, foreign policy, and the need for confidential communications as "special factors" barring a *Bivens* action. These factors, however, do not support preclusion of *Bivens* relief for a claim of torture and arbitrary detention, particularly when weighed against the factors favoring relief.

Respondents argue that reviewing Arar's claim risks intruding on executive prerogative with respect to foreign policy and national security authority. But as the Solicitor General concedes, federal policy and federal law are crystal-clear: torture is never a policy option. Ashcroft Opp. 9. Awarding damages on a claim that federal officials conspired to torture would interfere with no legitimate executive

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[11] Both briefs in opposition point to a single boilerplate sentence in the court of appeals' opinion to suggest that the court considered positive factors *sub silentio*, despite the court's own statement that its refusal to "take account of countervailing factors" was "integral to the holding." Pet. App. 32a, n.7; Thompson Opp. 20; Ashcroft Opp. 18 (both quoting Pet. App. 31a-32a). That sentence, which simply states that the "special factors should be substantial enough to justify the absence of a damages remedy for a wrong," Pet. App. 31a-32a, provides no indication that the court somehow considered the factors it expressly said that it would *not* consider.

discretion, as there is no discretion to subject a human being to such treatment.

Moreover, Congress has expressly authorized *courts* to review and reverse removal orders where they find, contrary to the executive's judgment, that even a risk of torture is present. Congress does not consider these matters beyond judicial purview; on the contrary, it deems judicial review essential. The existence of a statutory directive for courts to review torture claims in the removal setting sharply distinguishes this case from *Munaf v. Geren*, 128 S. Ct. 2207 (2008), in which no such express statutory directive existed. In *Munaf*, this Court held that absent an extreme case, courts cannot interfere with the transfer of a citizen captured in Iraq during wartime to the Iraqi government for prosecution of crimes committed in Iraq. The Court in *Munaf* stressed that "this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." *Id.* at 2226. Arar's case is even more extreme than the "extreme" case hypothesized in *Munaf*, for Arar alleges that defendants intentionally sent him to Syria not simply knowing he would likely be tortured, but *because* he would be tortured. And here, unlike *Munaf*, Arar was in the United States, not in a war zone, and Congress explicitly authorized review of his claims.

Respondents contend that judicial review of CAT claims is generally based on country reports and transcripts of witness testimony, and does not usually involve review of, for example, executive communications regarding assurances. Thompson

Opp. 15. But Congress provided for judicial review in *all* removal cases where a risk of torture is allegedly present, and made no exception for cases involving "diplomatic assurances." In fact, federal courts have reviewed removal cases involving assurances, and the Third Circuit has held that foreign nationals must be afforded an opportunity to challenge the reliability of those assurances—an opportunity Arar never received. *Khouzam v. Attorney General of the United States*, 549 F.3d 235, 259 (3d Cir. 2008). Reviewing assurances, far from being improper for judicial review, is essential if the protections afforded by law are to be enforceable. Courts overseas accordingly routinely review assurances in national security cases to assess whether they are adequate to eliminate the risk of torture.[12]

Respondents also point to the risk that classified information might be revealed, including confidential communications between the United States and Canada and Syria. Thompson Opp. 16-17; Ashcroft Opp. 13. But Canada has fully investigated Arar's case, and has stated that litigating Arar's

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[12] *See, e.g., Trabelsi v. Italy*, App. No. 50163/08 (Eur. Ct. H.R. 2010) (finding diplomatic assurances Italy obtained from Tunisia insufficient to permit removal); *Klein v. Russia*, App. No. 24268/08 (Eur. Ct. H.R. 2010) (finding diplomatic assurances from Colombia insufficient to permit extradition); *Saadi v. Italy*, App. No. 37201/06, at ¶138 (Eur. Ct. H.R. 2008) (finding diplomatic assurances from Tunisia insufficient to permit removal); *RB & U (Algeria) and OO (Jordan) v. Sec'y of State for the Home Dep't*, [2009] UKHL 10 (appeal taken from Eng.) (U.K.) (finding diplomatic assurances sufficient to permit removal); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1S.C.R. 3, 2002 SCC 1 (Can.) (finding diplomatic assurances from Sri Lanka insufficient to permit removal).

claims in this proceeding would raise no concerns from its vantage point. *See* May 24, 2010 Request by Petitioner to Lodge Letter from Canada's Minister of Foreign Affairs ("the Government of Canada confirms that it does not have reason to believe that Mr. Arar's civil suit in the United States would risk harming diplomatic relations between Canada and the United States"). Any legitimate secrecy concerns on the part of the United States may be addressed by a proper assertion of the state secrets privilege, which has its own particular procedures and parameters to prevent the disclosure of privileged evidence. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). The district court and court of appeals bypassed that process entirely, and dismissed the case at the threshold on the mere *possibility* that classified evidence might be implicated. As this Court noted in *Boumediene v. Bush*, if privileged evidence is implicated, the courts have procedures for addressing it. 128 S. Ct. 2229, 2276 (2008). To dismiss a case at the threshold based on the mere possibility that privileged material may be implicated, without pursuing the "state secrets" process set forth by this Court is contrary to *Reynolds* itself.

V. By Willfully Participating in Joint Action With Syrian Officials to Subject Arar to Torture in Syria, Respondents Acted Under Color of Both U.S. and Syrian Law.

Respondents' opposition to this Court's review of Arar's Torture Victim Protection Act (TVPA) claim rests entirely on their argument that they cannot have acted under color of Syrian law because they

acted as federal officials when they delivered Arar to Syria and conspired with Syrian security officials to have him tortured there. But respondents offer no reason why federal officials do not act under *both* federal law and foreign law when they conspire with foreign officials to have a person in their custody tortured by those foreign officials. If a private party had delivered Arar to Syria to be tortured, he would plainly be liable under the TVPA; there is no reason why the fact that respondents also abused federal power should immunize them from accountability for their collusion in subjecting Arar to torture under color of Syrian law.

The TVPA imposes liability on any "individual" who subjects another to torture under color of foreign law, and creates no exemption for United States officials. 28 U.S.C. § 1350 note.[13] A government official can act under color of law of more than one state or nation, and the majority did not find otherwise. *See* Pet. App. 170a (Pooler, J., dissenting) (majority did not adopt "questionable reasoning" that "federal official can act under color of only one sovereign's authority at a time").

Respondents concede that "color of law" under the TVPA is to be construed in accordance with jurisprudence under 42 U.S.C. § 1983,[14] and do not dis-

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[13] President Bush's statement expressing his belief that Congress did not intend that the TVPA "should apply to United States Armed Forces or law enforcement operations," *see* Ashcroft Opp. 24 n.8, sheds no light on *congressional* intent, and is especially suspect given that it is a self-serving assertion of executive immunity from legal accountability.

pute that TVPA liability extends to those who conspire to torture. Moreover, respondents concede that there are a variety of alternative "color of law" tests, Thompson Opp. 29, and do not seriously refute that "willful participation in joint action" is one of them. *See, e.g., Dennis v. Sparks*, 449 U.S. 24 (1980). The court of appeals' decision is at odds with this Court's section 1983 jurisprudence, and respondents fail to convincingly argue to the contrary.[15]

Respondents claim that an unarticulated "normative judgment" calls for using only the "traditional test" of *West v. Atkins*, 487 U.S. 42 (1988), here. Thompson Opp. 29-30. Yet respondents provide no rationale for why the TVPA "color of law" formulation should be limited to that used in *West*, and should not include the alternative "color of law" tests applicable to section 1983, including the "willful participation" test articulated in *Dennis v. Sparks*.

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[14] Thompson Opp. 28 n. 15. Respondents' resurrection of the district court's contention that it is no "simple matter to equate" domestic actions with those "undertaken under color of foreign law," *Id.* at 31, quoting Pet. App. 371a, ignores Congress's explicit direction to look to section 1983 in construing "color of law" in the TVPA, even though it *always* involves action under foreign law. H.R. Rep. No. 102-367, at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 87; S. Rep. No. 102-249, 1991 WL 258662, at *8 (1991).

[15] Respondents' suggestion that *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), questioned the "joint participation" test is unfounded. *Sullivan* merely reiterated that the holding in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982) is limited to the context of prejudgment attachment procedures. *Sullivan*, 526 U.S. at 58; *see also Lugar*, 457 U.S. at 939 n.21. *Sullivan* did not even cite *Dennis v. Sparks*, much less purport to undercut its holding

See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (willful participation in joint activity is one of various color of law tests). Congress directed that the same standards should apply to the TVPA, and thus the *Sparks* test is applicable.

Sparks held that private parties who influenced a government official to abuse his government position acted under color of state law because they willfully participated in joint action with the official. *Sparks*, 449 U.S. at 27-29.[16] The test in *Sparks* is easily satisfied here, as respondents are alleged to have delivered Arar to Syria to have him tortured by Syrian officials, provided information to them to guide their questions under torture, and received the answers from them. That is more than enough to establish willful participation in joint action.

As Judge Pooler noted in dissent below, any distinction between directly exercising power under foreign law and facilitating that exercise of power is "unprincipled," Pet. App. 170a, given that conspirators are deemed "agents of one another," a point respondents do not dispute. *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974). As Judge Pooler ex-

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[16] *West*, on the other hand, found that a private physician with a part-time contract with the state to treat inmates acted under color of state law in providing medical treatment. *West*, 487 U.S. at 56-57. Therefore the doctor "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West*, 487 U.S. at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Nothing in *West* purports to overrule *Sparks*, or to limit "color of law" jurisprudence to the particular facts presented.

plained, "Arar alleges that U.S. officials, recognizing that Syrian law was more permissive of torture than U.S. law, contacted an agent in Syria to arrange to have Arar tortured under the authority of Syrian law." Pet. App. 169a. "[D]efendants' wrongdoing was only possible due to the latitude permitted under Syrian law and their joint action with Syrian authorities." *Id.* Under these circumstances, it is the height of formalism to say that U.S. officials did not act under color of Syrian law merely because they simultaneously abused their own authority.

The majority's dismissal of Arar's TVPA claim conflicts not only with this Court's color of law jurisprudence, but also with the Eleventh Circuit's TVPA decision in *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005). *Aldana* found that allegations that defendant colluded in the torture of plaintiffs by a group that included a Guatemalan official were sufficient to state a claim for TVPA purposes. *Id.* at 1249. Respondents attempt to distinguish *Aldana* because the defendant there was not a federal official. Thompson Opp. 29 n.7. But again, neither respondents nor the court of appeals offer a principled reason for treating a private party and a federal official differently when they conspire with foreign officials to subject an individual to torture under color of foreign law, as alleged here. Absent a principled distinction, the court of appeals' decision squarely conflicts with *Aldana*.[17]

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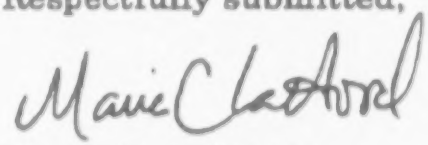
[17] Respondents incorrectly assert that every court to consider the issue has ruled that U.S. officials pursuing federal policy cannot act under color of foreign law for TVPA purposes. Thompson Opp. 28; *cf.*, Ashcroft Opp. 25-26. In fact, *Gonzalez-Vera v. Kissinger* did not adopt defendant's argument that as a

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be granted.

Dated: May 24, 2010

Respectfully submitted,



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U.S. official he could not have acted under color of law of a foreign nation. No. 02-cv-02240, 2004 WL 5584378 at *8 (D.D.C. Sept. 17, 2004), *aff'd on other grounds*, 449 F.3d 1260 (D.C. Cir. 2006). Plaintiffs' TVPA claims were dismissed because their complaint did not allege that defendant was a "willful participant in joint action with the state or its agents." *Id.* at *9 (internal quotations omitted).

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No. 09-923

In the Supreme Court of the United States

MAHER ARAR,

Petitioner,

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER

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March 4, 2010

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INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York[1] was founded in 1870 and has been dedicated since that date to maintaining the highest ethical standards of the profession, promoting reform of the law, and providing service to the profession and the public. With its nearly 23,000 members, the Association is among the nation's oldest and largest bar associations.

The Association has long been committed to protecting, preserving and promoting civil liberties, civil rights, and the democratic process. Through its standing committees, including those on Civil Rights, Federal Courts, Federal Legislation, Military Affairs and Justice, and International Human Rights, the Association seeks to assure protection of Americans' fundamental constitutional rights even, or especially, in times of crisis and to ensure that the demands of national security do not undermine the guarantees of civil liberties that are the hallmark of our constitutional democracy.

This case is of compelling interest to the Association, to the American people and to our nation's commitment to the rule of law. It is essential

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given appropriate notice of amicus curie's intention to file. The United States has filed a blanket consent and the consents of the other parties are being lodged herewith.

to preserve the ability of U.S. federal courts to remedy constitutional violations of the most brutal kind — state-orchestrated secret detention and torture of individuals carried out in a way designed to circumvent judicial review and accountability. Such constitutional violations must have remedies, and those remedies depend, under our system of law, on an independent judiciary providing meaningful review of executive-branch action. The decision of the U.S. Court of Appeals for the Second Circuit is a roadmap for the executive branch to circumvent that review even when carrying out torture-based inquisitions. Because such conduct is not compatible with American constitutional principles, it may not be exempted from judicial scrutiny. The Association therefore submits this brief, as a Friend of the Court, in support of the Petition of Maher Arar requesting that this Court grant *certiorari* to review the decision of the U.S. Court of Appeals for the Second Circuit in *Arar v. Ashcroft*, 585 F. 3d 559 (2d Cir. 2009).

SUMMARY OF ARGUMENT

In this case, the executive branch violated an individual's constitutional rights and usurped the role of the judiciary by having Maher Arar ("Arar") shipped overseas for torture based on discredited information collected by executive officials prior to Arar's arrest. To ensure there would be no review of the basis for his detention and the risk that he would be tortured, those executive officials effectively displaced the judiciary and actively denied Arar access to the courts prior to his delivery to Syria's torturers.

As the case now stands, no one from the executive branch will be held accountable for the alleged conspiracy to torture Arar. Instead, the Second Circuit has set out a roadmap for the

executive to continue conspiring to torture in a consequence-free environment. The test for judicial review created by the Second Circuit in this case is an abdication of the federal courts' constitutional role as an independent and co-equal branch of government that is required to remedy violations of constitutional rights. Under the Second Circuit's novel test, executive officials can arrange for torture without consequence, as long as an attorney from the executive branch eventually drafts a brief mentioning that national security was at stake.

The Second Circuit's decision undermines judicial independence by ensuring that there will be no judicial review of constitutional violations in cases involving national security. This Court should grant the Petition for Certiorari and, on review, reject the Second Circuit's test as inconsistent with the role of the law in our nation and the role of federal courts in enforcing that law.

ARGUMENT

I. REVIEW SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION UNDERMINES ESSENTIAL CONSTITUTIONAL PROTECTION

Our Constitution applies "to our rulers and people, equally in war and in peace." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 12-21 (1866). The defendant executive officers allegedly violated the Constitution, and the judicial branch must now determine whether those officers are responsible and, if so, provide a remedy. The failure of the Second Circuit of the Court of Appeals to hold the defendants accountable for the alleged constitutional violations in this case, instead deferring to the executive branch's broad assertions of national

security, erodes our constitutional guarantees for citizens and all who come into contact with U.S. government officials. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

A. The Second Circuit's Decision Allows Executive Action Depriving Arar of Constitutional Rights to Go Unchecked

The purpose of the remedy established in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), "is to deter individual federal officers from committing constitutional violations." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). The Second Circuit decision in this case held that the actions taken by the defendants were in a "new context" of *Bivens* claims and declined to recognize a cause of action.[2] There is nothing new about the context of the defendants' actions. The Magna Carta limited the authority of kings so that no man be would be "imprisoned... or banished" without judicial review. Art. 39, in *Sources of Our Liberties* 17 (R. Perry & J. Cooper eds. 1959). Alexander Hamilton recognized the "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten," as one of the "favorite and most formidable instruments of tyrants." Federalist No. 84, p.474 (Isaac Kramnick ed. 1987). In this case, the defendants blocked Arar's access to judicial review before secretly hurrying him off to be tortured in a Syrian jail. These actions are such an

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[2] *Arar v. Ashcroft*, 585 F. 3d 559, 563 (2d Cir. 2009).

established method of tyranny that they were banned within the Constitution and have been recognized as a basis for *Bivens* causes of action. U.S. Const. amend. V (guaranteeing right to a notice of charges and an opportunity to be heard); Art. 1, § 9, cl. 2 (guaranteeing right to judicial review of executive detention); *Arar v. Ashcroft* (Parker dissent), 585 F.3d at 597-98 (listing cases recognizing *Bivens* causes of action for such violations).

The Second Circuit fails to recognize the defendants' constitutional violations, instead proclaiming a single "new context" — the "delivery of a non-citizen to a foreign country for torture" [3] —and holds that the courts must wait for Congress to determine whether a victim of such constitutional violations should have a remedy.[4] Under the Second Circuit's rationale, "a new context" could as easily be coined involving the delivery of a citizen to a foreign country for torture and, as long as the executive officials could successfully employ force and deception to block the citizen from filing a *habeas corpus* petition, no cause of action would lie against the executive officials that chose to participate in those actions. The Second Circuit's rationale leaves executive officials unconstrained by either the Constitution or statutes and unchecked by the courts.

Failure of an independent judiciary to check the executive leads to gross violations of constitutional rights, particularly during times of perceived crisis. *See Korematsu v. United States*, 323 U.S. 214 (1944) (Supreme Court defers to executive assertions of power and allows Japanese-

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[3] *Arar*, 585 F. 3d at 572.

[4] *Id.* at 564-65.

American internment). Recent executive efforts to evade judicial review of gross constitutional violations are well documented. *See, e.g., Senate Armed Services Committee Report on the Treatment of Detainees in U.S. Custody* (detailing executive's broad assertions of power facilitating torture).[5] We rely on the courts to hold executive officials accountable for constitutional violations, even in times of perceived crisis. "In times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." *Korematsu v. United States*, 484 F. Supp. 1406 (N.D. Cal. 1984) (*coram nobis* case).

Longstanding authority recognizes the role of the courts as the appropriate, indeed indispensable, check on the executive. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976); *see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 US 50 (1982) (quoting Federalist Papers); Retired Federal Judges' Amicus Brief.

As explained below in Point II, the test set out by the Second Circuit for recognizing a cause of action under *Bivens* allows the executive to decide when the judicial branch will have the opportunity to check the executive. This test, vesting the executive with the unilateral authority to determine when a claim may stand, is contrary to the constitutional

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[5] *See* p. 32 (describing memos drafted by presidential aides advising agencies that federal anti-torture statues do not apply to interrogations ordered by the President) and p. 33 (CIA torturers considered the memos a "golden shield").

role of an independent judiciary. When *Bivens* claims are pleaded, executive officers are the defendants, not disinterested magistrates. The Constitution does not anticipate the judiciary's ceding its powers to the executive. *United States v. Nixon*, 418 U.S. 683, 704 (1974) (judicial power cannot be shared with the executive).

B. The Absence of a Statutory Remedy Favors Recognition of a Judicial Remedy for Executive Constitutional Violations

Despite the Second Circuit's willingness to permit the defendants to avoid accountability, the Constitution requires a judicial forum when a constitutional right is at stake. *Crowell v. Benson*, 285 U.S. 22 (1934) (upholding the legality of an administrative court in part because the statute at issue did not prohibit constitutional claims from being brought in Article III courts). Here, Arar alleged that executive officials detained him while changing planes in New York City, denied him access to his attorney and the courts, and conspired with third parties to have him interrogated under torture in a country known by the government to torture detainees.[6] Rather than recognize a cause of action

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[6]Arar's allegations are strongly corroborated by the report of the Office of Inspector General for the Department of Homeland Security, which carried out an independent investigation of the defendants' actions that substantially confirms the allegations in the complaint. Department of Homeland Security, Office of Inspector General, *The Removal of a Canadian Citizen to Syria, OIG-08-18* (March 2008) ("OIG Report"). The Canadian government also performed an independent investigation of its role in Arar's abuse, which further verifies the allegations in the complaint. Arar Comm'n, *Report of the Events Relating to Maher Arar* (2006) ("Canadian Report").

for these constitutional violations, the Second Circuit denied Arar a judicial forum, holding that the court must wait for Congress to provide a legislative remedy for these constitutional violations.[7]

The Second Circuit misconstrues the role of the courts in remedying constitutional violations. The judiciary's constitutional role is protecting against constitutional violations perpetrated by the executive and providing a remedy under *Bivens* when there is no statutory remedy. *Bush v. Lucas*, 462 U.S. 367 (1983) (declining to recognize a *Bivens* claim where legislative remedial scheme already provided a remedy). The Second Circuit turns this obligation on its head by citing the absence of a legislative remedial scheme as a reason to dismiss Arar's claim and allow constitutional violations to continue without remedy.[8] *See, contra, Bivens*, 403 U.S. at 397 (allowing damages where there is no "explicit congressional declaration" that plaintiffs must pursue another remedy "equally effective in the view of Congress"); *Ex parte Young*, 209 U.S. 123 (1908) (in the absence of statutory authority, the court may issue relief for constitutional violations). In doing so, the Second Circuit has abdicated its duty to protect constitutional guarantees. *See Ex parte Quirin*, 317 U.S. 1, 19 (1942) (it is the duty of the courts to preserve constitutional safeguards). Although Congress can displace the *Bivens* remedy by enacting an alternative statutory remedy,

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[7] *Arar*, 585 F. 3d at 564-65.

[8] *Id.* at 565 ("Congress has not prohibited the practice [of extraordinary rendition], imposed limits on its use, or created a cause of action").

legislative inaction supports, rather than undercuts, recognition of a *Bivens* remedy.[9]

C. The Executive's Actions to Deprive a Detainee of Access to the Courts Are Constitutional Violations That Require a Remedy

A basic principle of our society is the right to be heard before being condemned. *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The executive's use of deception and force to deny Arar access to court violated the Fifth Amendment to the U.S. Constitution and willfully undermined separation of powers. *See Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008) (only the judiciary can decide where *habeas corpus* applies). In other cases where the executive sought to act unilaterally, it claimed the constitutional power to do so. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (asserting war

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[9] In addition, the U.S. is a signatory to the Convention Against Torture, which requires a remedy for torture victims. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.S.T.S. 85, entered into force June 26, 1987, art. 14. The State Department has assured the United Nations that victims of torture by federal officials can find the obligatory remedy in *Bivens* actions. *See* U.S. Dep't of State, United States Written Response to Questions Asked by the United Nations Committee Against Torture 10 (bullet-point 5) (Apr. 28, 2006), *available at* http://www.state.gov/documents/organization /68662.pdf; U.S. Dep't of State, *United States Report to the Committee Against Torture*, ¶ 51 (bullet-point 5), U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf; *see also* Petitioner's Brief; Canadian Human Rights Organizations and Scholars Brief. Denial of a *Bivens* cause of action removes an essential remedy to ensure compliance with U.S. treaty commitments.

powers); *United States v. Nixon*, 418 U.S. 683 (1974) (asserting executive privilege); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (asserting inherent authority). In the present case, the executive exercised a *de facto* power without even claiming support from the Constitution. By keeping Arar in a maximum security holding cell, interrogating him without notifying his attorney,[10] falsely telling him that his attorney had been informed of the interrogation and chose not to attend,[11] serving him with an essentially blank order of removal form to satisfy a five-day notice requirement,[12] and then filling in the blanks en route to his transfer to Syria[13] to ensure that no *habeas* petition could be timely filed,[14] the executive repeatedly resorted to unlawful and unconstitutional deception and force to deny Arar access to court. Denying federal court review of an administratively issued order of removal is illegal. *INS v. St. Cyr*, 533

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[10] OIG Report, p. 19.

[11] *Id.* at p. 25.

[12] *Id.* at pp. 14-15 ("under the section 235(c) proceeding... he was given 5 days to respond... [h]owever, the form did not specify the underlying reasons for the section 235(c) proceeding, nor did it inform Arar of the country to which he would be removed").

[13] *Id.* at p. 30 ("On Monday, October 7, 2002... the INS Commissioner signed the memorandum that authorized Arar's removal to Syria ... At approximately 4:30 a.m. on Tuesday, October 8, 2002, Arar was served with the I-148 [with notice of his removal to Syria] while being transported to an airport in New Jersey.").

[14] *Id.* at p. 31 ("INS attorneys believed that Arar and his attorney would have had the opportunity to review the I-148 after its issuance and INS attorneys expected the 'inevitable habeas' to be filed at any time. However, that opportunity was never realized as Arar was removed immediately after service of the I-148.").

U.S. 289, 297, 314 (2001) (construing a statute not to bar an alien's *habeas* petition so as to avoid the serious constitutional questions raised by denying a forum for *habeas* review); *see also Bounds v. Smith*, 430 U.S. 817 (1977) (denial of access to courts is unconstitutional); *Ex parte Hull*, 312 U.S. 546, 549 (1941) ("the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of *habeas corpus*").

Where, as here, the past acts of government officials make it impossible for a person to assert legal rights in court, damages are the appropriate remedy. *Christopher v. Harbury*, 536 U.S. 403 (2002). The two-part test of *Harbury* requires (1) the existence of a non-frivolous legal claim that had been frustrated by the defendants' behavior and (2) the impossibility of obtaining adequate compensation by pursuing the underlying legal claim in a contemporaneous judicial forum. 536 U.S. at 415-16. Judicial review of either the removal order (which included the knowingly false determination that Arar was not likely to be tortured in Syria) or a *habeas corpus* petition would have shielded Arar from being delivered by defendants to Syria's torturers. Undoubtedly for that reason, the defendants actively denied Arar access to such legal relief. Arar satisfies the *Harbury* two-part test and, therefore, damages are the appropriate remedy.

II. REVIEW SHOULD BE GRANTED BECAUSE THE *BIVENS* "SPECIAL FACTORS" ANALYSIS ADOPTED BY THE SECOND CIRCUIT ABANDONS THE COURTS' ROLE AS THE GUARDIAN AGAINST UNCONSTITUTIONAL EXECUTIVE CONDUCT

The *Bivens* "special factors" analysis applied by the Second Circuit permits the executive to determine when executive constitutional violations cannot be redressed. Under the Second Circuit's test, if a judge would "pause even to consider" the appropriateness of a *Bivens* cause of action, no damages claim will be recognized.[15] The judges "do not take account of countervailing factors."[16] No affirmative factor favoring a *Bivens* remedy raised by the plaintiff will be considered, and the defendant's mere mention of a so-called "special factor" precludes the cause of action. Such "analysis" is not judicial review but rather supine obedience to the executive and an evisceration of judicial independence.

This purported "analysis" provides a perverse incentive for the executive branch to assert "special factors" when its actions are most culpable and would not otherwise withstand scrutiny from an independent judiciary. This case is a prime example. The Canadian Report on Arar makes clear that the "national security" concerns raised by the executive were either wrong or exaggerated. The Canadian information initially provided to the INS on Arar was "either completely inaccurate or, at a minimum, tended to overstate his importance" in an ongoing Canadian investigation.[17] The error was

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[15] *Arar*, 585 F. 3d at 574.

[16] *Id.* at 574, n. 7.

[17] Canadian Report, p. 113.

immediately brought to the attention of the INS. A fax sent to "American authorities" on October 4, 2002, while Arar was being held by INS, said that Canada was "unable to indicate that Mr. Arar had links to al-Qaeda."[18] Telephone conversations between intelligence officers in Canada and the INS, while Arar was still in U.S. custody, further established that Canada did not have information linking Arar to al-Qaeda.[19] That the INS chose to disregard that information while arranging for Arar's torture would, under any judicial analysis, be weighed against the executive's bald assertions that national security was at stake. Instead, the Second Circuit has invented a test that invites the executive to assert, as it did here, "national security" issues simply to avoid judicial review of actions that could not otherwise withstand any measure of scrutiny from an independent judiciary.

A. Denial of Judicial Review in This Case Violates Due Process Under the Constitution

Blocking Arar's access to court to ensure that he could not have his detention reviewed violated the Constitution in at least three ways. First, access to court is a constitutional guarantee. *See Tennessee v. Lane*, 541 U.S. 509 (1988). In this case, the defendants' use of deception and force to block access to court was a constitutional violation.

Second, the Constitution requires a hearing at a meaningful time and in a meaningful manner. *Boddie v. Connecticut*, 401 U.S. 371 (1971). In this case, the administrative decisions that Arar was an inadmissible alien and that he would not be tortured

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[18] *Id.* at p. 114.

[19] *Id.* at p. 153.

in Syria could have been reviewed by a court. By deceiving his lawyer and serving Arar with a reviewable administrative decision while he was already in transit to Syria, the defendants actively denied a hearing at a meaningful time.[20] The decision was never forwarded to Arar's attorney.[21] Such acts are unconstitutional and an affront to the independence of the judicial branch and to our entire system of justice.

Third, destruction of legal claims is a violation of due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (negligent destruction of a legal claim is a violation of due process). Here, the defendants' intentional destruction of Arar's legal claims for review of unconstitutional administrative decisions, by blocking access to court by force and deception, violated constitutional due process guarantees. *See Webster v. Doe*, 486 U.S. 592 (1988) (requiring judicial review of constitutional claims associated with administrative decisions).

The "special factors" analysis as applied by the Second Circuit denies a remedy for these constitutional violations by denying review of Arar's claims. Recognition of Arar's claims would not inhibit any lawful government actions and no contrary Congressional intent exists. Indeed, U.S. statutes and court cases forbid the actions allegedly taken against Arar. 18 U.S.C. § 2441 (prohibiting torture for the purpose of obtaining information); 18 U.S.C. § 2340A(c) (prohibiting conspiracy to torture abroad); 8 U.S.C. § 1231 (barring removal of any person to a country where he will likely be tortured); 28 U.S.C. § 2241 (providing statutory authority to

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[20] OIG Report, p. 30.

[21] *Id.*

grant writ of *habeas corpus*); *see also Wilkie v. Robbins*, 551 U.S. 537 (2007) (declining to recognize a *Bivens* claim that would inhibit lawful executive acts). The need for the assertion of the rule of law here is acute and requires a *Bivens* remedy to provide a check on executive violations of due process.

B. The Bivens "Special Factors" Analysis, as Applied by the Second Circuit, Subjects the Courts to Executive Manipulation and Vitiates Meaningful Review of Constitutional Violations

The *Bivens* "special factors" analysis applied by the Second Circuit prevents the judiciary from implementing procedures, such as *in camera* review, that address the executive's concerns while preserving the constitutional remedy. Open court proceedings safeguard against attempts to use the courts as instruments of persecution;[22] this causes the Second Circuit to pause to consider whether to recognize a *Bivens* cause of action where *in camera* review of secret documents may be required. In the Second Circuit's view, that hesitation slams the court's door on those whose torture was arranged by the defendants and then classified as "secret" by those same defendants.[23] Requiring dismissal based on "hesitation" creates a perverse incentive for reflexive decisions and prevents thoughtful evaluation and development of the record at the district court level. Here, the Second Circuit denied a remedy for constitutional violations because any decisions the district court might reach based on reviewing documents *in camera* might lead some

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[22] *Arar*, 585 F. 3d at 577.

[23] *Id.*

observers to assume a miscarriage of justice. The Second Circuit has thus allowed a hypothetical perception of injustice to bar the doors of the court to a plaintiff, thereby ensuring injustice.[24]

To date, no court has reviewed the alleged state secrets that allegedly counsel hesitation in this case. The Canadian Report indicates that Canada initially provided baseless information to U.S. officials about Arar[25] but subsequently corrected that information on multiple occasions while Arar was still in U.S. custody.[26] The FBI told the Canadians, the day after Arar was transferred to Syria, that they had no information that would allow them to hold Arar.[27] Despite this publicly available evidence that

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[24] The Second Circuit's concern about potential national security and state secrets issues ignores precedent addressing these issues. *See United States v. Reynolds*, 345 U.S. 1, 7 (1953) (discussing state secrets privilege, which requires the court to determine when to recognize the privilege); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("[s]imply saying 'military secret,' 'national security,' or 'terrorist threat'... is insufficient to support the privilege").

[25] Canadian Report, p. 13 ("The RCMP requested that American authorities place lookouts for Mr. Arar and his wife, Monia Mazigh, in U.S. Customs' Treasury Enforcement Communications System (TECS). In the request, to which no caveats were attached, the RCMP described Mr. Arar and Dr. Mazigh as "Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement."[FN] The RCMP had no basis for this description, which had the potential to create serious consequences for Mr. Arar in light of American attitudes and practices at the time.").

[26] *Id.* at pp. 149 and 153.

[27] *Id.* at p. 154 (On October 8, an FBI official reported to Canadian intelligence officers that "the FBI did not have any information that would allow it to hold Mr. Arar.").

national security concerns were wildly exaggerated, the defendants' mere assertion of secrets and national security caused the Second Circuit to decline to recognize a cause of action. By adopting a standard that requires dismissal of *Bivens* causes of action whenever the executive has the foresight self-servingly to classify documents as secret and then assert national security concerns in court, the Second Circuit has created a test that requires the least scrutiny of the most serious allegations – those in which executive officials, such as the defendants here, detain and arrange for the torture of their victims while blocking their access to the courts.

The Second Circuit's analysis also precludes meaningful review by first misconstruing Arar's complaint as a challenge to "extraordinary rendition," thereby overlooking the constitutional violations that Arar actually alleges. The court then dismisses the claim based not on analysis of the defendants' constitutional violations but rather on whether issues raised by the defense "counsel hesitation" in recognizing a *Bivens* remedy.[28] The facts underlying Arar's "access to court" claim were readily available and publicly known. There were no alternative legal remedies. In subsuming Arar's claim under the rubric of "extraordinary rendition," the Second Circuit ignores the unconstitutional treatment to which Arar was allegedly subjected as a prelude to his being forcibly sent to Syria, a government known for torture. Under this decision, an executive officer concerned about being accused of a constitutional violation can avoid accountability for past misconduct merely by committing additional constitutional violations and having the victim shipped off to torturers in a foreign country.

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[28] *Arar*, 585 F. 3d at 574.

C. In Its *Bivens* "Special Factors" Analysis, the Second Circuit Abandons Its Proper Role as a Guardian Against Unconstitutional Executive Conduct

The Second Circuit asserts that a Bivens cause of action is reserved for those times when it is "easy to identify both the line between constitutional and unconstitutional conduct and the alternative course which officers should have pursued."[29] This standard is clearly met in this case. The decision that torture is unconstitutional is easy and the alternatives to torture are obvious.

In support of its conclusion that the determinations as to constitutionality and as to alternative conduct were difficult to identify, the Second Circuit rambles through a series of irrelevant choices (*e.g.*, "should the officers have let Arar go on his way and board his flight to Montreal?")[30] to demonstrate that the defendants did not have a clear constitutional path forward. This bit of rhetoric ignores the question at the heart of this case: Should the defendants have blocked Arar's access to court while arranging for his torture in Syria? The Constitution provides a clear answer: torture or complicity in torture is categorically forbidden by the Constitution, statutes, and treaties. *See Chavez v. Martinez*, 538 U.S. 760, 773 (2003) ("Our views... do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial"); *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (due process bars executive officials from employing their power as an "instrument of

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[29] *Id.* at 580.

[30] *Id.* at 572.

oppression" in a manner that "shocks the conscience of the court"); *Rochin v. California*, 342 U.S. 165, 166 (1952) (due process requires the state to observe "certain decencies of civilized conduct" and prohibits "methods too close to the rack and screw to permit of constitutional differentiation"); *Irvine v. California*, 327 U.S. 128, 133 (1954) ("coercion, violence or brutality to the person" which "shocks the conscience" violates due process); *Williams v. United States*, 341 U.S. 97, 101 (1951) ("[W]here police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution.").

A constitutional path forward was available to the defendants and was ignored: allowing Arar access to the courts and not torturing him. Instead, according to the complaint, the defendants unconstitutionally and illegally conspired to torture Arar in a misguided effort to produce intelligence on al-Qaeda. The role of an independent judiciary is not to empathize with imagined difficult decisions made by such defendants but to protect victims against constitutional violations. Our constitutional framework of government requiring a judicial check on such unconscionable executive actions protects the rule of law only when such checks are exercised by an independent judiciary.

CONCLUSION

This Court should grant the Petition for Certiorari, the decision of the Second Circuit should be reversed, and a *Bivens* remedy should be recognized for the reasons explained above.

Dated: March 4, 2010

Respectfully submitted,

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IN THE

Supreme Court of the United States

MAHER ARAR,

Petitioner,

—v.—

JOHN ASHCROFT,
FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE BAR OF ENGLAND AND WALES HUMAN RIGHTS COMMITTEE AND THE EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The first named *amicus*, the Bar Human Rights Committee of England and Wales ("the BHRC") is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial.

The second named *amicus*, the European Center for Constitutional and Human Rights ("ECCHR") is an independent, non-profit legal organization, registered with the Regional Court Berlin-Charlottenburg, dedicated to protecting civil and human rights. ECCHR also works to ensure that the absolute prohibition of torture is upheld across the world.

This brief is submitted in support of the Petitioner.

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[1] The content of this brief is entirely the work of the authors identified and no party other than the *amici* and their legal representatives have made a monetary contribution to the preparation or submission of this brief. The Counsel of Record received timely notice of the intent to file this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court

SUMMARY OF THE ARGUMENT

It is recognised that the claim by the Petitioner is for damages arising from a specific incident (or incidents) and that the claim is not a generalised attack on the policy or practice known as "extraordinary rendition"[2]. Nevertheless this litigation is not taking place in a vacuum. When deciding whether to grant a writ of certiorari this Court must consider the broader international context.

This brief seeks to describe the impact in Europe of the practice of "extraordinary rendition" by the authorities of the United States and also to describe the reaction of Courts and other bodies to that practice.

In the light of Arguments I to III, as set out below:

(1) The "importance" of the Petitioner's case, cannot be measured by reference solely to the national United States context.

(2) It would be anomalous if the Supreme Court of the United States refused even to engage with the issues raised by the case of Mr Arar (by granting a writ of certiorari) in circumstances where: (a) "extraordinary rendition" is a practice that emanates from the United States; (b) Courts, National Authorities and Transnational Authorities outside the United States have conducted investigations,

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[2] In this document the phrase "extraordinary rendition" is used to mean the practice, implemented by the CIA, whereby individuals are transferred from one country to another, extralegally, for the purpose of detention and interrogation rather than for the purpose of being put on trial: see ECCHR Report on "Extraordinary Rendition", dated March 2008, p6.

made findings of fact and determined (or are in the process of determining) cases, including claims for damages, all relating to the practice of extraordinary rendition; (c) those Courts and Authorities have acted and are continuing to act notwithstanding arguments by the Executive based on "national security", "state secrecy" and "conduct of foreign relations".

ARGUMENT

I An Inquiry by the Council of Europe has concluded that European countries are involved in the practice by the United States of "extraordinary rendition". The Council of Europe and the European Parliament consider that this practice undermines human rights and have urged further investigations at national level.

The Council of Europe[3]

In November 2005 the Parliamentary Assembly of the Council of Europe appointed Senator Dick Marty[4] to conduct a parliamentary inquiry into "alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe Member State"[5]. On 7 June 2006 Senator Marty presented his first report[6]. The report analysed information

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[3] The Council of Europe is an international organisation in Strasbourg comprising 47 countries of Europe which was set up to promote democracy and protect human rights and the rule of law in Europe. It is distinct from the European Council and the Council of the European Union. The Parliamentary Assembly is the deliberative body of the Council of Europe, composed of representatives appointed by the 47 member states' national parliaments. It is distinct from the European Parliament, which is an organ of the European Union.

[4] Dick Marty is a Swiss politician and former state prosecutor of the canton of Ticino in Switzerland. He is a member of the Swiss Council of States and a member of the Parliamentary Assembly of the Council of Europe.

[5] Appointed by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.

[6] AS/Jur (2006) 16 Part II, at http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf (last reviewed on 3 March 2010).

received from national governments, NGOs, journalists, air traffic control authorities and certain confidential sources[7]. It concluded that: (1) the CIA's "rendition" programme involved a "spider's web" of aircraft landing points across the globe[8] (2) the purpose of the landing points ranged from re-fuelling to dropping-off detainees near to secret detention centres[9] (3) several European countries had actively participated in these activities, whilst others had "knowingly" ignored them[10] (4) there was good reason to believe that secret detention centres had existed and that inter-state transfers had taken place in Europe[11]. He argued that a number of European States had breached their "positive obligation to investigate diligently any serious allegations of fundamental rights violations"[12].

On 11 June 2007 Senator Marty presented his second report[13]. It concluded: (1) the evidence established that secret detention facilities run by the CIA did exist in Europe, in particular in Poland and Romania[14] (2) these facilities were run directly and exclusively by the CIA[15] (3) the CIA had committed a

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[7] Report, paras 14-18, 280 Senator Marty did not have any special investigatory powers, for example to require the release of documents from governments or individuals (para 14)

[8] Para 280

[9] Para 281-282

[10] Para 285

[11] Para 287. Senator Marty's conclusion in this regard was based on inference rather than on direct evidence (para 287)

[12] Para 287.

[13] Doc. 11302 rev., at http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf (last reviewed on 3 March 2010)

[14] Para 7

[15] Para 8

series of illegal acts in Europe by abducting individuals, detaining them in secret locations and subjecting them to interrogation techniques tantamount to torture[16] (4) the acts took place with knowledge or active assistance of government agencies in the countries concerned[17]. The report expressed grave concerns about the consequences of these practices:

> "The commission of unlawful acts - abductions, the exporting of torture to other countries even though they are regarded as "rogue states", the setting up of detention centres beyond any judicial supervision-has severely affected the moral authority of the United States. Worse still, the world's greatest power is becoming a negative role model for other countries, which feel that they may legitimately follow the same path and flout human rights. The systematic exporting of such activities outside American territory also constitutes a form of contempt for the rest of the world, and the reservation of such methods exclusively for non-Americans is an expression of an "apartheid" mentality in the legal sphere."[18]

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[16] Para 9
[17] Para 8
[18] Para 337.

The European Parliament[19]

On 30 January 2007 a Temporary Committee of the European Parliament presented its report "on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners."[20] On 14 February 2007 the European Parliament approved the report[21]. It described "extraordinary rendition" as an illegal practice, in breach of international human rights standards, whereby an individual is abducted in one country and transferred to another for interrogation, which often involved incommunicado detention and torture[22]. It urged Member States of the European Union[23] to

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[19] The European Parliament is the parliamentary body of the European Union which comprises 785 Members of Parliament of the 27 European Union countries, elected by universal suffrage. Together with the Council of the European Union (which is distinct from the European Council and the Council of Europe), it forms the bicameral legislative branch of the European Union.

[20] See (2006/2200(INI)) for the text of the report, at http //www europarl europa eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2007-0020&language=EN#title2 (last reviewed on 3 March 2010). The Temporary Committee was set up further to the decision of 18 January 2006 of the European Parliament, see http //www europarl europa eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0012&language=EN (last reviewed on 3 March 2010).

[21] European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), at http //www europarl.europa.eu/sides/getDoc do?type=TA&language=EN&reference=P6-TA-2007-0032 (last reviewed on 3 March 2010).

[22] Para 36

[23] As at 5 March 2010, the Member States of the European Union are Austria, Belgium, Bulgaria, Cyprus, Czech Republic,

investigate any allegations of extraordinary rendition in which they were implicated, pursuant to their obligations under the European Convention of Human Rights[24].

II. National Parliaments and other national authorities in Europe have conducted or are conducting inquiries of investigations into the practice of "Extraordinary Rendition". They have condemned the practice and found evidence of involvement by their respective States

Despite the conclusions and recommendations set out in the Council of Europe and European Parliament reports cited above, not all European countries have been quick to initiate or pursue proper inquiries. Nevertheless at least the following significant inquiries or investigations have taken place or are in progress.

Germany

On 7 April 2006 the German Parliament established a "Committee of Inquiry" to clarify *inter alia* the nature and scope of involvement by German executive agencies[25] with CIA rendition flights and

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Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom

[24] Para 186.

[25] In particular the Federal Intelligence Service (BND), Federal Office for the Protection of the Constitution (BfV), Federal Armed Forces Counterintelligence Office (MAD),

secret prisons for terror suspects and the nature and scope of oversight and control in this regard.[26]

One of the cases considered was that of Mr Khaled El Masri, a German citizen, allegedly abducted in Macedonia in December 2003 and then transferred via Baghdad to Kabul. During the transport and his detention he is said to have been subjected to beatings, stress positions, forced feeding and other forms of mistreatment. In May 2004 he was released without any charges[27].

On 18 June, 2009 the Committee presented its 1300 page final report. It concluded *inter alia* that the German Federal Intelligence Service had performed interrogations of a terror subject (Mr Mohammed Zammar) in a Syrian prison[28]. It also

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Federal Prosecutor General (GBA) and Federal Criminal Police Office (BKA)

[26] Mandate for the Committee of Inquiry, July 6, 2007, English version available at http //www bundestag de/bundestag/ausschuesse/ua/1_ua/auftrag/auftrag_erweiter_eng.pdf (last reviewed on 1 March 2010)

[27] The Munich district court issued 13 international arrest warrants against CIA employees in January 2007 However, so far the German government has not requested extradition In the U.S., the American Civil Liberties Union filed a complaint with the District Court for the Eastern District of Virginia on behalf of El Masri against former CIA director Tenet, three CIA linked air transport companies and 20 employees of the CIA or the companies The case was rejected in May 2006 and the appeal in October 2007 A petition to the Inter-American Court on Human Rights is still pending In Albania, requests for information to the government were dismissed

[28] Final report of the Committee of Inquiry, June 18, 2009, Deutscher Bundestag Drucksache 16/13400 , p. 382, available at http //dip21.bundestag de/dip21/btd/16/134/1613400.pdf (last reviewed on 2 March 2010)

established the existence of two CIA-rendition-flights, one of which had stopped over on German territory and one of which flew over German airspace. It called the practice of extraordinary rendition illegal[29]. Nevertheless, as set out below, there were widespread complaints about the conduct of the German Government in relation to the work of the Committee.

Lithuania

In December 2009 an inquiry by a Committee of the Lithuania Parliament found that the Lithuanian "State Security Department" ("the SSD") had received requests from the CIA to "equip facilities in Lithuania suitable for holding detainees" and that two such facilities had been built, apparently with the assistance of the SSD but without approval from the appropriate political authorities[30]. The report also established that CIA airplanes had landed in Lithuania without proper border checks or inspections[31]. The report is based on testimonies of

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[29] Final report of the Committee of Inquiry, n 28, pp 398 and 403.

[30] "*Findings of the Parliamentary Investigation by the Seimas Committee on National Security and Defence Concerning the alleged transportation and confinement of persons detained by the Central Intelligence Agency of the United States of America in the territory of the Republic Of Lithuania*", at http //www3 lrs.lt/docs2/MMZSXOMO.DOC The Committee was unable to determine conclusively whether or to what extent the facilities had in fact been used as secret detention facilities.

[31] http //www.amnesty.org/en/news-and-updates/news/lithuania-admits-existence-secret-prison-20091222

politicians and national security officials.[32] In December 2009 the Head of the Intelligence Service resigned over the issue, whilst in January 2010 the Minister of Foreign Affairs also resigned. On 14 January 2010 the Lithuanian President urged prosecutors to launch their own investigation into the matter[33].

Poland

On 11 March 2008, the district Prosecutor's Office in Warsaw instituted proceedings relating to the alleged existence of secret CIA detention facilities in Poland and the illegal transport and detention of persons suspected of terrorism. On 1 April 2009, following the reorganization of the Public Prosecutor's Office, the investigation was referred to the Appellate Prosecutor Office in Warsaw. In the course of their investigation the prosecutors have gathered evidence but, for reasons of "confidentiality", have not yet made this evidence public[34].

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[32] http //www.nytimes.com/2009/12/23/world/europe/23lithuania html.

[33] UN Doc A/HRC/13/42, para 122.

[34] This is based on the response given by the Polish authorities to a questionnaire sent by United Nations experts for the purposes of a UN Joint Study UN Doc A/HRC/13/42 "Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism", para 118 In their report, which was published on 19 February 2010, the experts expressed concern about "the lack of transparency" in the Polish

In February 2010, the "Air Navigation Services Agency" published flight logs as a result of a request under the "Freedom of Information Act". These logs provide further evidence of the existence of secret prisons in Poland and the transfer of detainees to the country. CIA airplanes used the Szymany military airport at least six times in 2003 for flights coming from Kabul, Afghanistan, and Rabat, Morocco[35].

III Courts in Europe have considered or are considering claims for damages, claims for disclosure of information and criminal prosecutions, all arising from the practice of "extraordinary rendition". Arguments by the Executive based on "state secrecy", or "national security" or the "conduct of foreign relations" have been dismissed, have not been determinative or, where accepted, have caused potential injustice

This section does not purport to be exhaustive but does set out what are considered to be the most important and relevant pieces of litigation in Europe.

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investigation because "after 18 months still nothing was known about [its] exact scope" (at para 119).

[35] Nicholas Kulish and Scott Shane, New York Times, "Flight Data Show Rendition Planes Landed in Poland", 22 February 2010, at http //www nytimes com/2010/02/23/world/europe/23poland html (last reviewed on 3 March 2010).

Germany

On June 17, 2009 the German Federal Constitutional Court decided that the conduct of the German government in relation to the "Committee of Inquiry" referred to above violated the German Constitution[36]. The Government had refused to disclose information to the Committee and had restricted or refused permission for witnesses to give evidence before it. The Government gave two reasons for its actions. First, disclosure of the information and evidence would affect the "core of executive responsibility" (the so-called *Kernbereich exekutiver Eigenverantwortung*)[37]. Second, disclosure would endanger "essential national interests", particularly national security and foreign relations.

In the view of the Court, mere assertions that a certain class of evidence related to the process of decision-making in government or to another protected sphere did not, on their own, justify the refusal to disclose that evidence. Otherwise effective control of government would be impossible.[38] Instead, whether disclosure prejudiced the "core of executive responsibility" or not depended on the circumstances of the case in question. The "interest in control" of

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[36] BVerfG, 2 BvE 3/07 from June 17, 2009, available at http://www.bverfg.de/entscheidungen/es20090617_2bve000307.html (last reviewed on 1 March 2010).

[37] As a German legal term this responsibility concludes a necessarily protected sphere of the executive against the legislative and the judicial branch. It encompasses particularly the governmental decision making process. So it protects information regarding on-going processes, but under certain circumstances also information on closed issues.

[38] BVerfG, n. 36, para. 125.

the executive was particular strong if it concerned the investigation of potentially illegal actions.[39]

The Court also rejected the Government's claim of "essential national interests". All three branches of government are entrusted with the protection of essential national interests. Accordingly, a claim by the executive against the judicial or legislative branch of "essential national interests" was barred if procedural means were available to ensure secrecy.[40] Furthermore, the executive's unsupported claim that foreign relations would be affected was insufficient to justify non-disclosure. The executive had to show precisely how and why diplomatic relations and diplomatic cooperation by other states would be endangered; these matters would then still have to be balanced against the "interest in control".[41]

Italy

In February 2003 Mr Hassan Mustafa Osama Nasr, (an Egyptian citizen who had acquired refugee status in Italy), was allegedly abducted by CIA agents working in collaboration with the Italian Military Secret Service and forcibly transferred to a U.S. airbase in Aviano, from which he was rendered to Egypt and subsequently tortured. On 8 June 2007, a criminal trial began in Milan against U.S. and

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[39] BVerfG, n. 36, para 127.
[40] BVerfG, n 36, para 130
[41] BVerfG, n. 36, para. 214

Italian agents accused of involvement in Abu Omar's abduction.[42]

President Romano Prodi[43] lodged a case before the Italian Constitutional Court, arguing that the Italian judiciary had broken state secrecy laws during their investigation by using classified documents related to national security that

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[42]The accused were indicted "for having kidnapped, depriving [Nasr Osama Mustafa Hassan alias Abu Omar] of personal freedom . apprehending him by force and forcibly making him enter a van, thereafter taking him first to the US military airbase at Aviano, where the United States of America Air Force 31st FW (Fighter Wing) is stationed, and thence to Egypt" (Official English translation, Milan Tribunal, Judge Presiding over Preliminary Investigations, 11 March 2004, at http //www statewatch org/cia/documents/milan-tribunal-19-us-citizens-sought pdf (accessed 1 March 2010)) Note that the prosecution's strategy was to prosecute both Italian and foreign officials not for their complicity in torture but for the crime of abduction

[43] Mr Prodi was President of Italy at the time.

constituted 'state secrets.'[44] On 11 March 2009, Italy's Constitutional Court ruled that any evidence of contact between the Italian secret service and the CIA was covered by state secrecy and therefore inadmissible in trial[45].

Nevertheless, whilst awaiting a ruling by the Constitutional Court, the Milan judge had ordered all uncensored documents, which were the object of complaints before the Constitutional Court, to be expunged from the proceedings and replaced by censored versions. Accordingly the trial resumed on 20 May 2008 and proceeded to a final verdict, even though (ultimately) some uncensored evidence could not be admitted in the light of the Constitutional Court decision. On 4 November 2009, the Milan Court convicted 23 of 26 CIA agents, who were tried *in absentia*, for abduction and also found that two out

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[44] The President also argued that the prosecutor had ordered the wire-tapping of 180 phone numbers belonging to secret services agents, thus uncovering the whole communication network of the agency and the identity of 85 agents (Messineo, Francesco "The *Abu Omar* Case in Italy' 'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture under the UN Torture Convention" in *Journal of International Criminal Justice, Vol 7, No 5, 2009,* 22).

[45] Judgement of the Italian constitutional court No.106 Year 2009 at http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_106_2009_EN.doc (last reviewed on 3 March 2010) In addition to excluding SIMSi documents and any testimonies that revealed any relation between SISMi and the CIA, key witnesses could also no longer appear in court to give evidence of this relation (Amnesty International 3)

of the seven Italian officials on trial had illegally collaborated in CIA abuses. [46]

In February 2010, the Milan Judge released a 200-page report in which he explained the reasoning behind his ruling. He stated that the fact that the CIA had conducted the mission on Italian soil with such impunity "leads to the presumption that such activity was carried out at least with the knowledge (or maybe with the complicity)" of the Italian secret service.[47] He added that it was "not possible" to prove those ties due to state secrecy, which he claimed created a kind of 'black curtain' over crucial parts of the trial[48]. He criticised the Constitutional Court

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[46] The judge handed down the following verdicts an eight-year sentence for Robert Seldon Lady (former CIA station chief in Milan), 3-year sentences for two former members of SISMi charged with aiding and abetting (Pio Pompa and Luciano Seno), and five-year sentences for 22 other Americans The court dropped charges for five Italian defendants charged with abduction, who are all former or current officials with SISMI, because the evidence against them is protected by state secrecy. Charges were also dropped for three Americans [Jeffrey Castelli, former CIA Rome station chief, and Betnie Medero and Ralph Henry Russomando (both former members of the CIA in Italy)] who were found to be protected by diplomatic immunity agreements The seven Italian defendants were tried in person while the 26 Americans were tried *in absentia* The Italian government provided legal representation for the American defendants, while two of them opted to hire private council The 23 Americans defendants are considered fugitives and, on the basis of the European Arrest Warrant, will be arrested and removed to Italy should they set foot in the E.U

[47] Rachel Donadio, "Judge Ties Italy's Secret Service to Cleric's Abduction", 1 February 2010, at http://www.nytimes.com/2010/02/02/world/europe/02italy.html (last reviewed on 3 March 2010).

[48] Ibid

ruling for creating a "logical and juridical paradox"[49] and concluded that secret services should not be shielded from responsibility for crimes solely due to the involvement of foreign governments.

The United Kingdom

A damages claim is being brought against the UK "Security Service", the "Secret Intelligence Service" and other UK governmental authorities. The Claimants[50] say that they were the subject of "extraordinary rendition" to various locations around the world (including Guantanamo Bay) where they were detained and tortured and that the Defendants caused or contributed to this treatment. Various causes of action are alleged, including false imprisonment, misfeasance in public office and conspiracy to injure. The Courts are currently considering what procedure should be used for the disclosure of potentially sensitive evidence. On 18 November 2009 Mr Justice Silber, determining a preliminary issue, held that it can in principle be lawful and proper for a "closed material procedure" to be used in a civil damages claim, but such a procedure should only be used in exceptional circumstances and as a last resort[51]. This procedure was defined as one whereby a party to litigation can rely on evidence without disclosing it to any other party, if such disclosure would be contrary to the

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[49] Ibid.

[50] Mr Bisher Al Rawi, Mr Binyam Mohammed and four others

[51] [2009] EWHC 2959 (QB), para 92 He did not determine whether such a procedure should be adopted in this particular case

"public interest"[52] and providing that the material is disclosed to "Special Advocates"[53] and, where appropriate, to the Court[54]. The claimants argued that such a procedure could not be lawful or proper in a civil claim for damages. It is understood that an appeal is pending against the decision of Mr Justice Silber.

One of the claimants in that case, Binyam Mohammed, has brought separate proceedings against the UK government seeking disclosure of certain documents relating to his treatment. He sought the documents in order to defend himself in Military Commission proceedings in the United States and to support his claim that his confessions were false and the result of torture or cruel, inhuman and degrading treatment by or on behalf of the United States government[55]. He sought disclosure on the basis that the UK authorities had become "mixed up" in the alleged wrong doing by the United States government and therefore were liable to provide disclosure under the "*Norwich Pharmacal*"

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[52] Disclosure was defined as being contrary to the public interest if "made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest" (para 2)

[53] "Special Advocates" are selected by the State and are appointed in order to "test and probe" closed evidence, but their ability to communicate with parties or their representatives is severely limited (para 4)

[54] Para 2

[55] As summarised in the Judgment of the Court of Appeal in *The Queen on the Application of Binyam Mohamed v The Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, judgment of 10 February 2010, at paras 25 and 60

principle[56]. In August 2008, on the basis of the evidence before it, the Divisional Court held that the UK authorities were "mixed up" in the alleged wrongdoing. The Court did not grant relief to Mr Mohammed but instead gave the Foreign Secretary the opportunity to consider whether to invoke "public interest immunity" in order to resist disclosure[57]. The Divisional Court delivered its judgment with certain paragraphs redacted, by reason of the special "closed procedure" that governed part of Mr Mohammed's application[58].

Thereafter there was further litigation, relating *inter alia* to the Government's use of "Public Interest Immunity Certificates"[59]. In particular, the Foreign Secretary sought to prevent publication of seven redacted paragraphs of the judgment of the Divisional Court by stating in "Public Interest Immunity Certificates" that such publication would lead to "a real risk of serious harm to the national security of the UK". In a judgment dated 10 February 2010, the Court of Appeal rejected his reliance on "Public Interest Immunity" and ordered disclosure of the paragraphs. The Court accepted that due respect must be accorded to the assessment of the Secretary State as to what would be contrary to the national interest, both on grounds of "principle and

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[56] That "If through no fault of his own a person gets mixed up in the tortuous acts of others so as to facilitate their wrongdoing . he comes under a duty to assist the person who has been wronged by giving him full information and disclosing his identity of the wrongdoers" (*ibid* at paras 25 and 63).

[57] *Ibid* at para 32, 65 to 73

[58] *Ibid* at para 72.

[59] Summarised at *ibid*, paras 73 to 128

practicality"[60]. Nevertheless that view was not determinative and (a) the Court was entitled to differ from that assessment if it had "cogent reasons" for doing so" and (b) even if did not differ the Court was entitled and obliged to weigh national security against the public interest in the judgment being open[61].

On the facts of the case the Court performed the balancing exercise and required publication of the redacted paragraphs, notwithstanding the assessment of the Foreign Secretary as set out above. The Court was particularly influenced by the fact that in separate proceedings in the US, a judge had found that as a fact in an open judgment that Mr Mohammed's evidence as to his mistreatment and torture at the behest of US officials in Pakistan, Morocco and Afghanistan was true[62]. One judge went as far as criticising evidence given by Security Service officials: ". . . some Security Service officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohammed when he was held at the behest of US officials"[63].

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[60] *Ibid* at paras 131-132

[61] *Ibid* at paras 130-133

[62] *Ibid* at paras 136 to 141

[63] Ibid at para 168, as finally published on 26 February 2010.

CONCLUSION

This Court should have regard to Arguments I to III above when considering whether to grant a writ of certiorari in this case.

March 5, 2010

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Supreme Court, U.S.
FILED
MAR 5 - 2010

No. 09-923

In The Supreme Court of the United States

MAHER ARAR,

Petitioner,

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* CANADIAN AND INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND SCHOLARS IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

Amici curiae are Canadian and international human rights organizations and scholars with an interest in the application of the established principle of international law which provides to victims of human rights violations – and, in particular, torture – the right to an effective remedy. *Amici* seek to have the United States comply with its obligations under international law to provide a person whose human rights have been violated with an effective remedy.[1]

It is not the role of these *amici* to advise the Court on the application of U.S. law. Rather, *amici* seek to bring to the Court's attention: (i) the bedrock rule of international law that victims of human rights violations have the right to pursue and receive an effective remedy; and (ii) the findings of the Canadian Commission of Inquiry into Maher Arar. Some *amici* were directly involved in the Commission of Inquiry, and all have closely considered its detailed and

---

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. *Amici curiae* provided Notice to the parties of their intention to file this brief at least 10 days prior to the due date, as required by Sup. Ct. R. 37.2(a). All parties have granted consent to the filing of a brief by *amici* either by filing a letter with the Clerk or by communicating such consent directly to counsel.

carefully cataloged findings concerning Mr. Arar's ordeal and the violation of his rights.[2]

SUMMARY OF ARGUMENT

Under international law all states are obliged to provide the victims of human rights violations, including torture, with an effective remedy. This includes the right of anyone who *claims* to have been a victim to have meaningful access to a *procedure* that is capable of repairing the effects of the violation, and the right actually to *receive* such reparation if the violation is established. This rule is without exception. Where several states are responsible for violations of the human rights of an individual, each has an obligation to provide an effective remedy in relation to its own responsibility. Provision of a partial remedy by one state for its own role does not release other states from their responsibility.

To investigate the facts concerning Mr. Arar, determine the responsibility of its officials and make recommendations for avoiding similar situations in the future, the government of Canada ordered a Commission of Inquiry. Following the release of the Commission's report, Canada provided a public apology and paid compensation to Mr. Arar for its role in his ordeal. The United States declined to cooperate

[2] A full list of *amici* is set forth in the Appendix to this brief.

with or participate in the Commission of Inquiry, and has not provided Mr. Arar with any remedy in relation to its own responsibility for the violation of his human rights. The ruling of the court below, if left to stand, would effectively deprive persons in Mr. Arar's situation of their right to access a procedure capable of providing an effective remedy. This would be inconsistent with the international legal obligations of the United States.

ARGUMENT

I. THE RIGHT TO AN EFFECTIVE REMEDY UNDER INTERNATIONAL LAW

International law binding upon the United States provides that a person who is the victim of a human rights violation, including torture, has the right to an effective remedy. Failure by the United States to provide access to an effective remedy for an individual who credibly claims to be the victim of torture or other human rights violations in relation to which the United States is responsible constitutes a violation of the individual's rights and U.S. obligations under international law.

A. States Must Provide Effective Remedies To Individuals for Violations of Human Rights

The right to an effective remedy for violations of internationally protected human rights is a

fundamental rule of international human rights law. This right stems from a general principle of international law that every breach gives rise to an obligation to provide a remedy.[3] It is also expressly prescribed in the general human rights treaties,[4] in thematic treaties including the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture"),[5] and in numerous non-treaty international

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[3] *See, e.g.*, *Castillo-Páez v. Perú*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 34 (Nov. 3, 1997); *Blake v. Guat.*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 48, at ¶ 63 (Jan. 22, 1999) (noting that the right to a remedy "is one of the fundamental pillars . . . of the very rule of law in a democratic society"); *Chorzów Factory (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at ¶ 21 (Sept. 13) ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.")

[4] International Covenant on Civil and Political Rights ("ICCPR") art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") art. 13, Nov. 4, 1950, 213 U.N.T.S. 222; American Convention on Human Rights ("ACHR") art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights ("African Charter") art. 7(1)(a), *adopted* June 27, 1981, 1520 U.N.T.S. 217; League of Arab States, Arab Charter on Human Rights ("Arab Charter") art. 23, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005).

[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture") art. 14, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

instruments.[6] It has also been recognized as a rule of customary international law.[7]

Article 2(3) of the International Covenant on Civil and Political Rights ("ICCPR"), which the United States ratified in 1992, gives particular effect to the general right of individuals to an effective remedy for violations of human rights under international law:

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[6] *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, art. 8, U.N. Doc. A/810 (Dec. 10, 1948); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133, art. XVIII (1949); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶ 4, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("U.N. Basic Principles on the Right to a Remedy"), G.A. Res. 60/147, Principles 18-23, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

[7] U.N. Basic Principles on the Right to a Remedy, Principles I.1(b) and 2; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, Decision on Appropriate Remedy, ¶ 40 (Jan. 31, 2007); *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, ¶¶ 23-25 (Sept. 13, 2007); *Cantoral-Benavides v. Perú*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, at ¶ 40 (Dec. 3, 2001); *Customary International Humanitarian Law, Vol. 1: Rules* 537-550 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds. 2005). The consistency of the principle of effectiveness of remedies across universal and regional legal systems and as grounded in the general public international law on state responsibility, as further explained below, is compelling evidence of its character as a norm of customary international law.

> 2(3) Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

The obligation to provide an effective remedy is "fundamental" and must be fulfilled in all situations, including in situations of public emergency which threaten the life of the nation.[8] Accordingly, the deprivation of the right to a remedy can never be justified on any grounds. Accusation (or, for that matter, conviction) of an individual as having threatened the

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[8] U.N. High Comm'r for Human Rights, Human Rights Committee ("UNHRC"), General Comment No. 29, ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001). The UNHRC is the expert body mandated by the ICCPR to review compliance. *See also Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9, at ¶¶ 24-25 (Oct. 6, 1987).

safety or lives of the public does not deprive the individual of the right of meaningful access to a procedure capable of providing an effective remedy for torture or other similar human rights violations which he or she claims to have suffered.

The remedy in question must also be *effective* and not merely theoretical or illusory. The individual must have practical and meaningful *access to a procedure* that is capable of ending and repairing the effects of the violation.[9] For some violations, including gross violations of international human rights law such as torture, the procedure must be judicial in character.[10] Where a violation is established, the individual must *actually receive* the relief needed to repair the harm.[11] Procedures for remedying human rights violations must "function effectively in practice,"[12] that is, they must be "accessible, effective and enforceable,"[13] and the remedy actually obtained

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[9] ICCPR art. 2(3)(b), U.N Basic Principles on the Right to a Remedy, Principles 2(b), 3(c), 11(a), 12

[10] U.N. Basic Principles on the Right to a Remedy, Principle 12.

[11] ICCPR arts. 2(3)(a) and (c); UNHRC, General Comment No 31 ("UNHRC General Comment No 31"), ¶ 15, U.N. Doc CCPR/C/21/Rev 1/Add 13 (May 26, 2004); U N. Basic Principles on the Right to a Remedy, Principles 2(c), 3(d), 11(b), 15-23

[12] UNHRC General Comment No 31, at ¶¶ 15, 20.

[13] *George Kazantzis v. Cyprus*, Communication No 972/2001, U.N Doc CCPR/C/78/D/972/2001, at ¶ 6.6 (2003) *See also Yasoda Sharma v. Nepal*, Communication No. 1469/2006, U N. Doc. CCPR/C/94/D/1469/2006, at ¶ 9 (2008)

through the procedure must be capable of providing real relief.[14]

Fulfilling the right to an effective remedy in any particular case entails the taking of all steps necessary to repair the violation, through a combination of relevant elements among: public apologies or memorials, restitution, compensation, rehabilitation, measures of satisfaction, such as guarantees of non-repetition and changes in relevant laws and practices, and bringing those responsible to justice.[15]

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[14] *Judicial Guarantees in States of Emergency*, *supra*, at ¶ 24, *Velásquez-Rodríguez v Hond.*, 1988 Inter-Am Ct H R. (ser. C) No. 4, at ¶¶ 63, 64, 66 (July 29, 1988), *Raquel Martí de Mejía v Perú*, Case 10.970, Inter-Am. C.H.R., Report No. 5/96, OEA/Ser L/V/II 91, doc 7, 157 at 190-191 (1996); *Silver v. U K*, Nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, 3 Eur. Comm'n H R. Dec. & Rep 475 at ¶ 113 (1983); *Airey v Ir*, 32 Eur Ct. H R (ser. A) at ¶ 24 (1979); African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, Principle C(a) (2001)

[15] *See* UNHRC General Comment No. 31, at ¶ 16; U.N Basic Principles on the Right to a Remedy, Principles 18-23. *See also Velásquez-Rodríguez v Hond*, 1989 Inter-Am Ct. H.R. (ser C) No. 7, at ¶¶ 25-26 (July 21, 1989), *Papamichalopoulos and Others v. Greece*, App. No 14556/89, 21 Eur. H R Rep. 439 at ¶ 34 (1995)

B. International Law Makes Particular Provision for the Right To an Effective Remedy for Violations of the Prohibition of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

The absolute and non-derogable prohibition of torture and other cruel, inhuman and degrading treatment or punishment ("other ill-treatment") forms part of customary international law[16] and has been codified in numerous international treaties.[17] The Convention against Torture reinforces the universal prohibition through a range of specific obligations that aim "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."[18] One key aspect of the prohibition of torture and other ill-treatment is the obligation of *non-refoulement*; states may not transfer individuals to countries where they would face a substantial *risk* of torture or other

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[16] *See* Nigel S Rodley with Matt Pollard, *The Treatment of Prisoners Under International Law* 64-81 (3d ed 2009); *see also Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶¶ 143-157 (Dec. 10, 1998) (finding also that the prohibition of torture is a peremptory norm of international law)

[17] *See, e g*, Geneva Convention (III) Relative to the Treatment of Prisoners of War arts 3, 17, 87, 130, Aug. 12, 1949, 6 U S T 3316, 75 U N T S. 135; ICCPR art. 7, ECHR art 3; ACHR art 5(2); African Charter art 5.

[18] Convention against Torture, Preamble

ill-treatment.[19] The obligation of *non-refoulement* is violated regardless of whether abuse actually results from the transfer. Where, however, torture or other ill-treatment *actually occurs* in the receiving state, the sending state additionally becomes jointly responsible *for the abuse itself* notwithstanding that the torture or other ill-treatment was at the hands of another state.[20]

Article 14 of the Convention against Torture expressly recognizes the universal right of victims of torture to obtain a remedy and the corresponding obligation of State Parties to provide it:

> Each State Party shall ensure in its legal system that the victim of an act of torture

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[19] This prohibition is founded in customary international law, Article 7 of the ICCPR and its analogues under regional treaties, and is partially codified by Article 3 of the Convention against Torture *See* Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement. Opinion, in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 155-164 (Erika Feller, Volker Turk & Frances Nicholson eds., 2003); *see also* Rodley & Pollard, *supra*, at 166-179; UNHRC, General Comment No. 20 ("UNHRC General Comment No 20"), ¶ 9, U.N. Doc HRI/GEN/1/Rev 9 (Oct. 3, 1992); UNHRC General Comment No 31, at ¶ 12.

[20] *Mansour Ahani v. Can.*, Communication No. 1051/2002, U.N Doc CCPR/C/80/D/1051/2002, at ¶ 12 (June 15, 2004) *See also* Responsibility of States for Internationally Wrongful Acts ("State Responsibility"), G A. Res. 56/83, arts 16, 41(2), U.N. Doc. A/RES/56/83 (Jan 28, 2002); *Report of the International Law Commission* ("ILC Report"), U.N. G.A.O R , 56th Sess., Supp No. 10 at 43, U N Doc A/56/10 (2001)

> obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.[21]

The U.N. Committee against Torture, the expert body charged by the Convention against Torture with monitoring compliance, has found a similar obligation to apply as regards other ill-treatment under Article 16 of the Convention.[22] The obligation to provide redress to a victim of torture or other ill-treatment is without exception, including in states of emergency.[23]

The U.N. Human Rights Committee and U.N. Committee against Torture have specifically applied

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[21] A similar obligation applies under the ICCPR by combined effect of Article 7 and Article 2(3) *See also* UNHRC General Comment No. 20, at ¶ 14; Arab Charter art 8(2)

[22] U N High Comm'r for Human Rights, Committee against Torture ("UNCAT"), General Comment No 2, ¶ 3, U N. Doc. CAT/C/GC/2 (Jan 24, 2008)

[23] *Id* at ¶ 6. When it examined the report of Canada in May 2005, the UNCAT noted as a subject of concern "the absence of effective measures [in Canada] to provide civil compensation to victims of torture *in all cases*" and recommended that Canada "review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to *all victims of torture*." UNCAT, *Conclusions and Recommendations (Canada)*, ¶¶ 4(g), 5(f), U N. Doc CAT/C/CR/34/CAN (July 7, 2005) [emphasis added]. *See also* UNCAT, *Conclusions and Recommendations (Republic of Korea)*, ¶ 8(a), U.N Doc CAT/C/KOR/CO/2 (July 25, 2006); UNCAT, *Conclusions and Recommendations (Japan)*, ¶ 23, U.N Doc CAT/C/JPN/CO/1 (Aug. 3, 2007); UNCAT, *Conclusions and Recommendations (New Zealand)*, ¶ 14, U N Doc. CAT/C/NZL/CO/5 (May 14, 2009).

the obligation to provide a remedy vis-à-vis renditions to risk of torture in violation of the obligation of *non-refoulement*.[24] Indeed, in 2006, the U.N. Human Rights Committee found that the United States was obliged to "investigate allegations of rendition and provide a remedy to its victims."[25]

C. Responsibility of Several States

Where an individual has suffered human rights violations at the hands of several states, he or she is entitled to a full remedy for all of the violations. So long as the right to an effective remedy remains unfulfilled in relation to an act for which a particular state is responsible, that state remains under the obligation to provide meaningful access to a procedure capable of providing an effective remedy.[26]

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[24] *Agiza v Swed.*, Communication No 233/2003, U.N Doc CAT/C/34/D/233/2003, at ¶¶ 13 6-13.8 (2005); *Alzery v. Swed.*, Communication No. 1416/2005, U N Doc. CCPR/C/88/D/1416/2005, at ¶¶ 12-13 (2006).

[25] UNHRC, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 16, U.N Doc CCPR/C/USA/CO/3 (Sept 15, 2006).

[26] *See, e g* , State Responsibility, *supra*, art. 47; *see also* ILC Report, *supra*, at 313-18.

II. THE REMEDY ACCORDED TO MAHER ARAR IN CANADA DID NOT ADDRESS VIOLATIONS OF HIS RIGHTS BY U.S. OFFICIALS

In its ruling below, the *en banc* majority of the United States Court of Appeals for the Second Circuit effectively denied Maher Arar the opportunity to seek a remedy for the conduct of U.S. officials in his case. Although, based on the findings of a Commission of Inquiry, the government of Canada has paid Mr. Arar compensation, he has not received redress from the U.S. in relation to the conduct of its officials. A person in the position of Mr. Arar, then, remains entitled under international law to a remedy for the violations of his or her rights.

A. The Mandate of the Commission of Inquiry Was Limited To the Actions of Canadian Officials

On February 5, 2004, Canada's Governor in Council appointed Justice Dennis R. O'Connor to conduct a Commission of Inquiry into Mr. Arar's case. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (2006) at 280.[27] Under Canadian law, the

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[27] The Commission's final report comprises three volumes. *See* Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (Analysis and Recommendations, Factual Background

(Continued on following page)

Governor in Council may create a federal commission of inquiry to address "any matter connected with the good government of Canada or the conduct of any part of the public business thereof." Inquiries Act, R.S.C., ch. I-11 (1985).

The Commission's mandate had two parts: a "factual inquiry" and a "policy review." A&R at 280. The factual inquiry focused on "the actions of Canadian officials in relation to Maher Arar," and, specifically, the role they played in Mr. Arar's detention in the United States, deportation, imprisonment and treatment in Syria, and return to Canada. *Id.* at 280-81.

The Inquiry, thus, was directed only to the actions of Canadian officials. The role of the United States government was not the focus of the Commission. Indeed, the U.S. government refused to provide evidence or participate in the Inquiry. *Id.* at 11.

The Commission heard from more than 70 witnesses during public hearings and *in camera* sessions. *Id.* at 10. Those testifying included government

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Vols I & II) (2006), *available at* http //epe lac-bac gc.ca/100/200/301/pco-bcp/commissions-ef/arar-ef/commisionners_report/index.html (last visited Feb 24, 2010) (hereinafter referred to as "A&R," "Vol I" and "Vol. II"). A subsequently-released Addendum contained additional information, previously withheld on the grounds that it was confidential *See* Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Addendum* (2006), *available at* http //www statewatch.org/news/2007/aug/canada-maher-arar-commreport.pdf (last visited Feb. 24, 2010) ("Addendum")

officials and experts in human rights, including some of the *amici* here. Vol. II at 651-52. Mr. Arar was granted standing as a party to the inquiry. *Id.* at 650. Several civil society and human rights organizations, including some of these *amici*, were accepted as interveners. *Id.*

The Commission stated that transparency and public accessibility were "essential" in its proceedings. A&R at 282. However, the Order creating the Commission laid out specific procedures to be followed in reviewing any evidence, the release of which would be "injurious to international relations, national defence or national security." *Id.* at 283. These included a requirement to review such evidence *in camera*. *Id.* Despite delays and challenges created by the Canadian government's overbroad invocation of secrecy, *id.* at 301-2, the Commission was ultimately able to reach and publish findings on the key issues, as described below.

B. The Findings of the Commission of Inquiry

In September 2006, the Commission released a public version of its three-volume, 1200-page report. The report provides a comprehensive and detailed analysis of the events involving Mr. Arar and, in particular, the role of Canadian officials.

1. Mr. Arar's Detention and Torture

a. Commission's Findings Regarding Detention in New York

The Commission found the following:

Mr. Arar, a citizen of Canada and Syria, was first detained by American officials on September 26, 2002, while he was changing planes at New York's JFK Airport, en route to Canada following a vacation in Tunisia. A&R at 53-54. He was placed under arrest and strip-searched. *Id.* For the next 12 days, Mr. Arar was held and subjected to extensive interrogations by American officials. *Id.* For the first four days, he was denied access to his family, a lawyer and Canadian consular officials. "Essentially, no one knew where he was." *Id.* at 172.

On October 1, after being contacted by Mr. Arar's concerned family, Canadian consular officials began inquiring of U.S. officials into the reason for Mr. Arar's detention. Notwithstanding repeated inquiries, consular officials could not ascertain the charges against him or the reasons behind his detention. *Id.* at 165-66. Finally, on October 3, a Canadian consul was able to visit Mr. Arar. *Id.* at 166. During that visit, Mr. Arar expressed concern that U.S. officials would send him to Syria. *Id.* at 166-67. Mr. Arar also met with a lawyer, arranged for by his family, on October 5. *Id.* at 168.

The U.S. Immigration and Naturalization Service ("INS") scheduled a removal hearing for Mr. Arar on Sunday, October 6. An INS official left a voicemail

message for Mr. Arar's lawyer on October 6, advising her of the hearing scheduled for the evening. But the message was not picked up until the next day. *Id.* at 168.

On October 7, Mr. Arar was ordered removed from the United States. The removal order accused Mr. Arar of being a member of a foreign terrorist organization: al-Qaeda. *Id.* at 155-56. The order also stated that the "Commissioner of the INS had determined that Mr. Arar's removal to Syria would be consistent" with the Convention against Torture. *Id.* at 156.

On October 8, Mr. Arar was shackled, put onto a plane and flown to Amman, Jordan. While in Jordan, Mr. Arar "suffered blows at the hands of his Jordanian guards." *Id.* at 54. The next day, he was put into a vehicle and taken to the Far Falestin prison in Syria, where he would spend the next ten months. *Id.* at 54-55, 57.

b. Commission's Findings Regarding Detention and Torture in Syria

The Commission found the following:

Upon arriving at Far Falestin, Mr. Arar was repeatedly interrogated and tortured by the Syrian intelligence service. A&R at 55. Syrian officials also threatened him with additional torture techniques including electrical shock and "the chair," *id.*, an

instrument that "bends backwards to asphyxiate the victim or fracture the victim's spine." Vol. II at 567. They hit Mr. Arar repeatedly and struck him with a two-foot shredded electrical cable. A&R at 55. He was also at times intentionally placed where he could hear the screams of other inmates. *Id.*

The worst of the physical abuse lasted for about a week, from October 9 until October 16, a period during which Mr. Arar was held incommunicado and the Canadian government did not know his whereabouts. *Id.* at 14, 55-56, 182. Mr. Arar remained at Far Falestin until August 20, 2003, when he was transferred to another prison. *Id.* at 57.

Throughout his time at Far Falestin, Mr. Arar was confined to a tiny basement cell. *Id.* at 56. Mr. Arar slept on the concrete floor. The cell was cold and damp in the winter, and extremely hot in the summer. *Id.* During this period of over 10 months, Mr. Arar rarely saw sunlight. Vol. II at 809.

The Syrians released Mr. Arar into Canadian custody on October 5, 2003, 374 days after he was detained by American officials in New York. A&R at 57.

2. The Commission Concluded Canadian Officials Did Not Participate in the Decision To Detain Mr. Arar and Send Him to Syria

The Commission concluded Canadian officials did not participate in the decision to detain Mr. Arar and send him to Syria. A&R at 14. Specifically, the Commission found:

On September 26, 2002, Royal Canadian Mounted Police ("RCMP") officials were notified by telephone of Mr. Arar's pending arrival in New York, and American authorities' intention to question him. *Id.* at 140. At that time, U.S. authorities indicated their intention to send Mr. Arar "back to Zurich, where his flight had originated." *Id.* The telephone call to the RCMP was the "first indication that Canadian officials had that the American authorities would take any action with respect to Mr. Arar," and there was "no evidence" that Canadian officials "ever discussed a scenario with American officials that involved Mr. Arar's being detained or sent to Syria." *Id.*

On October 3, the Central Intelligence Agency ("CIA") sent a fax to RCMP headquarters asking specific questions about Mr. Arar. *Id.* at 148; Addendum at 148. At this time, U.S. authorities provided no

indication to the RCMP that they were considering removing Mr. Arar to Syria.[28] A&R at 148.

On October 4 and 5, an RCMP officer spoke by telephone with American authorities about Mr. Arar. *Id.* at 151. In the first call, a Federal Bureau of Investigation ("FBI") official indicated that Mr. Arar would be sent to Switzerland. In response, the Canadian officer "suggested that Mr. Arar be sent to Canada," and indicated the "RCMP would look into setting up surveillance." *Id.* at 152. On October 5, the FBI official asked whether the RCMP could charge Mr. Arar and whether he could be refused entry to Canada. The RCMP officer indicated there was insufficient evidence to charge Mr. Arar in Canada and that he could probably not be refused entry to Canada as he was a Canadian citizen. *Id.*

On October 7, an FBI official asked whether Canadian authorities "could link Mr. Arar to al-Qaeda or any other terrorist group." *Id.* at 153. That same day, however, the INS Regional Director made an order finding Mr. Arar to be a member of al-Qaeda and refusing him entry to the United States. *Id.* at 155-56. Also on that day, in a conversation with Canadian authorities, the FBI official indicated that Mr. Arar would likely be deported to Canada following a

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[28] The Commission stated that information provided by the RCMP in response to the fax indicated that Canadian authorities "had yet to complete either a detailed investigation of Mr Arar or a link analysis on him." A&R at 148

final hearing on October 9. Vol. I at 171. On the assumption that Mr. Arar would be deported to Canada, an RCMP officer "was instructed to start preparing a surveillance package and interview questions for Mr. Arar." *Id.* at 173.

Based on the evidence, the Commission concluded, "American authorities were less than forthcoming with the RCMP and with Canadian consular officials about their plans for Mr. Arar." A&R at 153. The Commission found "no evidence that American officials ever indicated to a Canadian official that Syria was being considered. The American authorities appear to have intentionally kept Canadian officials in the dark about their plans to remove Mr. Arar to Syria."[29] *Id.*

3. The Commission's Findings Regarding the Conduct of Canadian Officials

The Commission made a number of findings regarding actions taken by certain Canadian officials at various stages of Mr. Arar's ordeal:

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[29] The Commission determined that, although Mr. Arar advised a Canadian consular official of his fear of being sent to Syria, "[b]ased on their experience and the information they had received, [foreign affairs officials] did not believe that there was an imminent risk that Mr. Arar would be sent to Syria . They were caught completely off guard when they learned of Mr. Arar's fate." A&R at 165.

First, the Commission faulted the RCMP for providing inaccurate information to U.S. authorities that "portrayed [Mr. Arar] in an unfairly negative fashion and overstated his importance in the RCMP investigation." A&R at 13. This information was likely relied upon by the U.S. in detaining Mr. Arar. *Id.* at 140. Specifically, although the RCMP only considered Mr. Arar a "person of interest," and on the periphery of an investigation centered on another individual, *id.* at 113, the RCMP submitted a request to U.S. Customs to include Mr. Arar and his wife in a database as part of a group of "Islamic Extremist individuals" with ties to al-Qaeda. Vol. II at 559. Also, when notified of Mr. Arar's imminent arrival in New York, the RCMP submitted a list of questions to the FBI that contained inaccurate information. A&R at 140-44. In the end, however, after hearing all of the evidence gathered by Canadian investigators about Mr. Arar, the Commission found no evidence that he had committed an offense or was a threat to the security of Canada.[30] *Id.* at 59.

Second, although it could not conclude whether Canadian officials could have secured an earlier release of Mr. Arar, the Commission expressed "serious

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[30] As set out earlier, whether a person is accused of or has in fact committed any criminal offense, or otherwise poses a threat to the safety or lives of the public, is entirely irrelevant to the individual's right to meaningful access to a procedure capable of providing an effective remedy for torture or other similar human rights violations the individual claims to have suffered.

concern" with regard to a number of actions taken by Canadian officials during his imprisonment in Syria. *Id.* at 14-15. In particular, there were mixed signals coming from Canadian officials. While the Department of Foreign Affairs and International Trade was demanding his release, intelligence officials may have created the impression that Mr. Arar was of continuing importance to its terrorism investigation. *Id.* at 213.

Third, upon Mr. Arar's return to Canada, there were leaks of confidential information for the purpose of damaging Mr. Arar's reputation. *Id.* at 16.

C. The Commission's Recommendations Pertained Only To Canadian Officials

The Commission issued 23 recommendations arising from the factual inquiry; only the final two addressed Mr. Arar's right to redress. A&R at 311-63. Twenty-one of the recommendations were directed to the Canadian police, intelligence and foreign affairs services, proposing changes to their internal procedures. *Id.* at 312-60. Recommendation 22 suggested the Canadian government should "register a formal objection with the governments of the United States and Syria concerning their treatment of Mr. Arar and Canadian officials involved with his case." *Id.* at 361. Recommendation 23 concerned compensation by Canada for Mr. Arar. *Id.* at 362. The Commission was not permitted to make assessments about whether the government of Canada was civilly liable to Mr.

Arar but stated that Canada "should assess Mr. Arar's claim for compensation in the light of the findings in this report and respond accordingly." *Id.*

None of the 23 recommendations addressed the role or responsibility of the United States, as this was not within the Commission's mandate.

D. The Canadian Government Provided Compensation and Issued an Apology for the Role Played By Canadian Officials

Following the release of the Commission's report, the government of Canada provided redress to Mr. Arar for the wrongdoing of Canadian officials. In settlement of his lawsuit against Canadian agencies and individuals, the government paid Mr. Arar CAD $10.5 million plus legal fees.[31] In January 2007, Prime Minister Stephen Harper publicly apologized to Mr. Arar for Canada's involvement. *Id.* The Prime Minister also provided a letter of apology for "any role Canadian officials may have played." *Id.* Canada's Foreign Ministry sent the United States an official letter of protest, and the Minister of Public Safety

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[31] Press Release, Office of the Prime Minister, *Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process*, Jan. 26, 2007, *available at* http://www.pm.gc.ca/eng/media.asp?id=1509 (last visited Feb. 24, 2010)

asked the United States to remove Mr. Arar from their terrorist look-out lists.[32]

These steps were apparently taken only with regard to the involvement of the Canadian government in Mr. Arar's ordeal. Mr. Arar has not obtained redress from other countries involved, including the U.S., whether in the form of a public apology, compensation or full acknowledgement of the facts and of responsibility of the state for violations of his human rights.

CONCLUSION

International law requires the United States to ensure that every individual who claims to have suffered human rights violations, including torture, in relation to which the United States is responsible, has meaningful access to a procedure capable of providing an effective remedy and, if the claim is established, that the individual actually receives effective reparation. Mr. Arar has received some redress from Canada arising from the responsibility of its own officials but he has not received redress from the United States. A person in his situation remains entitled to meaningful access to a procedure in the

[32] *Day: U S Asked to Clear Arar as Security Threat*, CTV News, Oct 1, 2006, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061001/arar_day_061001/20061001?hub=TopStories (last visited Feb. 24, 2010)

United States capable of providing an effective remedy for the human rights violations for which he claims the United States is responsible. For these reasons, *amici* respectfully urge this Honorable Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

Amici Curiae

Organizations

Amnesty International ("AI") is a worldwide movement of people working for respect and protection of internationally-recognized human rights principles. The organization has over 2.8 million members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest or religion. It bases its work on international human rights instruments adopted by the United Nations and regional bodies. Amnesty International played a central role in campaigning to protect Maher Arar's rights while he was imprisoned in the United States and Syria and in pressing for establishment of a public inquiry into his case. Its Canadian section, AI Canada, was granted intervener status before the Commission of Inquiry and made numerous oral and written submissions in the course of the proceedings.

The BC Civil Liberties Association ("BCCLA") is Canada's oldest civil liberties organization, and is dedicated to the promotion of civil liberties and human rights throughout British Columbia and Canada. The BCCLA actively works on issues such as privacy protections, discrimination, due process, freedom of speech, patients' rights, prisoners' rights and other emerging issues. The BCCLA has a long history and involvement with national security and intelligence issues, anti-terrorism legislation and police

accountability in Canada. The BCCLA was an intervener before the Commission of Inquiry.

The Canadian Arab Federation ("CAF"), established in 1967, is a national, non-partisan, non-profit and membership-based organization which represents Canadian Arabs on issues relating to public policy. Through education, public awareness, media relations and non-partisan government relations, CAF raises awareness of domestic and international issues that affect its community.

The Canadian Centre for International Justice ("CCIJ") is a charitable organization that works with survivors of genocide, torture and other atrocities to seek redress and bring perpetrators to justice. The CCIJ has intervened in several cases seeking remedies for Canadians tortured abroad. The CCIJ has named Maher Arar to its "Honorary Council," an honorary designation in recognition of his exemplary contribution to human rights and international justice. Members of the Honorary Council (including Mr. Arar) are not involved in the operation of the CCIJ, nor were they involved in the preparation of this brief.

The Canadian Centre for Victims of Torture ("CCVT") is a non-profit, charitable organization founded by several Toronto doctors, lawyers and social service professionals. The CCVT aids survivors in overcoming the lasting effects of torture and war. In partnership with the community, the Centre supports survivors in the process of successful integration into

Canadian society, works for their protection and integrity, and raises awareness of the continuing effects of torture and war on survivors and their families.

The Canadian Civil Liberties Association ("CCLA") is one of Canada's largest human rights advocacy organizations. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. The CCLA's major objectives include the legal protection of individual rights, freedoms and dignity and to ensure the protection of vulnerable groups in society. The CCLA has been granted intervener status before the Supreme Court of Canada over the past four decades on over a hundred leading human rights cases, engaging an understanding of international law and constitutional issues.

The Canadian Council for Refugees ("CCR") is a national umbrella organization comprising approximately 180 member agencies that work with, and on behalf of, refugees and immigrants in Canada. For over 30 years it has been serving the networking, information-exchange and advocacy needs of its membership. The CCR has come to be recognized as a key advocate for refugee rights in Canada.

The Canadian Council on American-Islamic Relations ("CAIR-CAN") strives to be a leading voice that enriches Canadian society through Muslim civic engagement and the promotion of human rights. CAIR-CAN is a national grassroots NGO that works

to represent the concerns of Canadian Muslims through dedicated and professional activism. This is achieved through community education and outreach, media engagement, anti-discrimination initiatives, public advocacy and partnering with other social justice organizations.

The International Civil Liberties Monitoring Group ("ICLMG") is a pan-Canadian coalition of 38 civil society organizations, including unions, professional associations, faith groups, environmental organizations, human rights and civil liberties advocates, as well as groups representing immigrant and refugee communities in Canada. The mandate of the ICLMG is to defend the civil liberties and human rights set out in the Canadian Charter of Rights and Freedoms, federal and provincial laws and international human rights instruments.

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(4)

No. 09-923

Supreme Court, U.S.
FILED
MAR 5 - 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MAHER ARAR,

Petitioner,

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF MANFRED NOWAK AND THEO VAN BOVEN, CURRENT AND FORMER U.N. SPECIAL RAPPORTEURS ON TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Manfred Nowak is the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment, a position he has held since 2004. He is Professor of International Human Rights Protection at the University of Vienna and Director of the Ludwig Boltzmann Institute of Human Rights. He has served as Chair of the European Masters Degree in Human Rights and Democratisation, a program initiated by the European Commission and jointly organized by 41 European universities, and has been since 1995 a Member of the International Commission of Jurists. Professor Nowak has served in a variety of capacities related to human rights, including as a Member of the EU Network of Independent Experts on Fundamental Rights (2002-2006), a U.N. Expert on Disappearances (1993-2006), a Consultant to the U.N. High Commissioner on Human Rights on poverty reduction (2001-2006), and a Judge at the Human Rights Chamber for Bosnia-Herzogovina (1996-2003). Professor Nowak has authored more than 400 publications in the fields of constitutional, administrative and international law, with a focus on human rights.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this *amicus* brief, all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

Theo van Boven served as the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment from 2001 to 2004. He is Professor of Law at the University of Maastricht, Netherlands. Professor van Boven is an Honorary Commissioner of the International Commission of Jurists and a Member of the Advisory Council of International Service for Human Rights (Geneva). Professor van Boven has served in a variety of capacities related to human rights, including as the Director of the U.N. Division of Human Rights (1977-1982), a Member of the U.N. Committee on the Elimination of Racial Discrimination (1992-1999), the Registrar of the International Criminal Tribunal for the Former Yugoslavia (1994), Special Rapporteur of the U.N. Sub-Commission on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (1990-1993), and a Member of the Group of Independent Experts of the International Labour Organization to Monitor Sanctions and Other Measures against Apartheid (1990-1993). Professor van Boven has published many books and articles on the law of torture and on international human rights law generally.

As current and former U.N. Special Rapporteurs on Torture and Other Cruel, Inhuman and Degrading Treatment, Professors Nowak and van Boven have a particular interest in promoting observance of the absolute and non-derogable prohibitions against torture and against the transfer of any person to a country where there are substantial grounds for believing

that the person would be in danger of being subjected to torture. *Amici* file this brief in support of Maher Arar's petition for *certiorari*.

SUMMARY OF ARGUMENT

This case involves allegations that officials of the United States government removed the petitioner, Maher Arar, from the United States via Jordan to Syria, for the purpose of having him interrogated under torture. If his allegations are true, Mr. Arar's treatment violated two of the most fundamental norms of human rights and humanitarian law: the absolute prohibition against torture, and the equally absolute prohibition against refoulement, or transfer, of a person to face torture. Impunity for acts of torture or refoulement to face torture can never be countenanced. Because of the nature and gravity of Mr. Arar's allegations, it is essential that he have the opportunity to have his case determined on the merits, in the interest of accountability and (if the allegations are found to be true) appropriate redress.

Amici therefore submit this brief in support of Mr. Arar's petition for *certiorari*, to urge this Court to review the lower court decision denying petitioner the opportunity to have his claims heard on the merits. *Amici* will present and support two fundamental premises. First, international law absolutely and without exception prohibits both torture and refoulement to face torture. Second, the United States has unequivocally undertaken to be bound by the

international prohibition against torture and refoulement to face torture through its ratification of relevant international treaties, its own domestic laws, and its official pronouncements to the international community.

ARGUMENT

I. INTERNATIONAL LAW UNEQUIVOCALLY PROHIBITS TORTURE AND REFOULEMENT TO FACE TORTURE

A. Torture is absolutely prohibited

(1) International Human Rights Law

The prohibition against torture is absolute. Torture is prohibited by a host of binding international treaties as well as by customary international law. It is prohibited both in times of peace and under circumstances of armed conflict. This prohibition admits of no exceptions. No extraordinary circumstances of any kind can justify the use of torture.

International human rights instruments absolutely prohibit torture. The Universal Declaration of Human Rights, adopted in 1948 by the United Nations General Assembly, proclaims in Article 5 that "[n]o one shall be subjected to torture."[2] This

[2] Universal Declaration of Human Rights, G.A. Res. 217A, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

aspirational mandate was transformed into a binding legal obligation through the International Covenant on Civil and Political Rights (ICCPR),[3] an international treaty which went into effect in 1976, and to which 165 nations have now committed themselves as States Parties.[4] Pursuant to ICCPR Article 2, every State Party is obliged "to respect and to ensure to all individuals within its territory and subject to its jurisdiction" each of the rights recognized in the ICCPR.[5] Among those rights is the Article 7 guarantee that "[n]o one shall be subjected to torture."[6] The absolute nature of this command is underscored by ICCPR Article 4, which addresses the human rights obligations of States Parties in the extreme circumstance of a "public emergency which threatens the life of the nation."[7] Although Article 4 allows States Parties in such a circumstance to take some "measures derogating from their [ICCPR] obligations," the Article 7 prohibition of torture is singled out as one of several

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[3] International Covenant on Civil and Political Rights art 4 2, *opened for signature* Dec 19, 1966, S Exec Doc C, D, E, F, 95-2 (1978), 999 U N T.S. 171 [hereinafter ICCPR]

[4] United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, International Covenant on Civil and Political Rights, http://treaties.un org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar 1, 2010)

[5] ICCPR, *supra* note 3, art 2.

[6] *Id.* art. 7

[7] *Id.* art 4

treaty obligations from which no derogation is ever allowed.[8]

Regional human rights treaties echo this prohibition on torture. The mandate that "[n]o one shall be subjected to torture" is reiterated in both the [European] Convention for the Protection of Human Rights and Fundamental Freedoms[9] and the American Convention on Human Rights,[10] and a comparable prohibition of torture appears in the African Charter on Human and Peoples' Rights.[11]

The international community's determination to put an effective end to torture is further reflected in the 1984 adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[12] That treaty – to which 147

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[8] *Id* art. 4.2

[9] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art 3, *entered into force* Sept 3, 1953, 213 U.N.T.S. 222

[10] Organization of American States, American Convention on Human Rights art 5 2, Nov 22, 1969, O.A.S.T.S No 36, 1144 U.N.T.S 123.

[11] Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights art 5, June 27, 1981, O.A.U Doc CAB/LEG/67/3 rev. 5, 1520 U.N.T.S 217.

[12] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec 10, 1984, S. Treaty Doc No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

nations are now States Parties[13] – sets forth a series of specific state obligations designed to prevent torture and, failing that, to hold every perpetrator accountable and to provide every victim of torture with an effective means of redress. It requires each State Party to "take effective legislative, administrative, judicial or other measures to prevent acts of torture."[14] It reiterates that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[15] It reminds that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture."[16] In a provision that will be discussed further, *infra* at 13 it declares that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[17] States Parties must "ensure" that all persons involved in any way in the "custody, interrogation or treatment of any individual subjected

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[13] United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#12 (last visited Mar. 2, 2010).

[14] CAT, *supra* note 12, art. 2.1.

[15] *Id.* art. 2.2.

[16] *Id.* art. 2.3.

[17] *Id.* art. 3.1.

to any form of arrest, detention or imprisonment" receive "education and information regarding the prohibition against torture," and the rules and instructions regarding their duties must include the prohibition against torture.[18] These requirements expressly extend to law enforcement personnel – both civil and military – as well as public officials and medical personnel.[19] Each State Party must "keep under systematic review" its "rules, instructions, methods and practices" with respect to interrogation, custody and treatment of persons under arrest, detention or imprisonment, "with a view to preventing any cases of torture."[20] To remove an incentive for torture, each State Party must "ensure" that no statement obtained under torture is used as evidence in any proceeding.[21]

To address those situations where torture occurs despite this panoply of preventive requirements, CAT requires measures to hold perpetrators accountable and to provide victims with appropriate redress. Each State Party must "ensure" that all acts of torture, attempts to commit torture, and acts constituting "complicity or participation in torture" are criminal offenses under its domestic criminal law.[22] Penalties

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[18] *Id* art 10

[19] *Id.*

[20] CAT, *supra* note 12, art 11.

[21] *Id.* art. 15. The sole exception is that a statement obtained under torture may be used in proceedings against the accused torturer, as evidence that the statement was made *Id.*

[22] *Id* art. 4.1

upon conviction of these torture offenses must be commensurate with the "grave nature" of these offenses.[23] Whenever a State Party becomes aware that a person accused of a torture offense is present in its territory, it must take steps to assure that the person is either extradited for prosecution elsewhere or referred for prosecution in its own courts.[24] If need be, a State Party must adjust its jurisdictional provisions so that such a person can be prosecuted in its domestic courts, even when the alleged torture offense occurred elsewhere, and when neither the accused nor the victim are nationals of that state.[25] These provisions are designed to guarantee that there be no impunity for torture offenses. They are matched by provisions guaranteeing a torture victim the opportunity for redress: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[26]

(2) International Humanitarian Law

International humanitarian law, applicable in situations of armed conflict, is equally firm in absolutely proscribing any act of torture. Torture is

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[23] *Id* art. 4.2.

[24] *Id* art. 7 1 *See also* arts 6-9

[25] CAT, *supra* note 12, art. 5

[26] *Id.* art. 14 1.

prohibited by each of the four Geneva Conventions of 1949, which protect, respectively, wounded and sick combatants on land (GC I), wounded and sick combatants at sea (GC II), prisoners of war (GC III), and civilians in wartime, including those living in occupied territories (GC IV).[27] The torture of protected persons is designated by each of the four Geneva Conventions as a "grave breach"[28] and hence is considered a war crime. Each State Party is required to enact any legislation "necessary to provide effective penal sanctions" for persons committing, or ordering to be committed, the grave breach of torture,[29] and is further required to search for persons accused of having ordered or committed torture, and either

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[27] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 12, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII]; Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 32, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[28] *See* GC I, *supra* note 27, art. 50; GC II, *supra* note 27, art. 51; GC III, *supra* note 27, art. 130; GC IV, *supra* note 27, art. 147.

[29] *See* GC I, *supra* note 27, art. 49; GC II, *supra* note 27, art. 50; GC III, *supra* note 27, art. 129; GC IV, *supra* note 27, art. 146.

prosecute them in its own courts or turn them over to another state for prosecution.[30]

While the provisions of the Geneva Conventions discussed above are applicable to armed conflict of an international character, Common Article 3 – the text of which appears, identically, as Article 3 of each of these four Geneva Conventions – proscribes torture when committed in the context of armed conflict not of an international character: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. . . . To this end, the following acts" – which include "torture" – "are and shall remain prohibited at any time and in any place whatsoever. . . ."[31] Torture in violation of Common Article 3 is considered a war crime.[32]

(3) Customary International Law

Customary international law as well as treaty law absolutely prohibits torture under any circumstance.

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[30] *See* GC I, *supra* note 27, art. 49; GC II, *supra* note 27, art. 50; GC III, *supra* note 27, art. 129; GC IV, *supra* note 27, art. 146.

[31] GC I, *supra* note 27, art. 3; GC II, *supra* note 27, art. 3; GC III, *supra* note 27, art. 3; GC IV, *supra* note 27, art. 3.

[32] *See* Rome Statute of the International Criminal Court art. 8(c)(i), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90. *See also* War Crimes Act of 1996, 18 U.S.C. § 2441 c(3) and d(1)(A) (2006).

Indeed, the prohibition against torture is recognized as a *jus cogens*, or "peremptory," norm of customary international law – *i.e.*, a norm "of superior status"[33] which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[34] As the Committee against Torture[35] has written, "Since the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of [CAT] article 2 reinforce this peremptory *jus cogens* norm against torture. . . ."[36] Other authorities are in agreement.[37]

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[33] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 331 cmt. e (1987) (noting peremptory norms enjoy "superior status" under international law).

[34] Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (defining "peremptory norm").

[35] The Committee against Torture (CAT) is a body of 10 independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties. Office of the United Nations High Commissioner for Human Rights, Committee against Torture: Monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment, http://www2.ohchr.org/english/bodies/cat/ (last visited Mar. 2, 2010).

[36] Comm. against Torture (CAT), *General Comment No. 2: Implementation of article 2 by States parties*, ¶ 1, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter CAT *General Comment No. 2*].

[37] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) and cmt. n (1987); *Prosecutor v.*

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Torture is thus proscribed absolutely and without exception as a matter of not only conventional but also customary international law.

B. Refoulement to face torture is absolutely prohibited

Just as torture itself is prohibited absolutely and without exception, so too is refoulement to face torture. The obligation of non-refoulement is clearly and unequivocally articulated in Article 3 of the Convention against Torture: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[38]

But while this obligation is a critical component of CAT, it did not originate with CAT. Rather, "[t]he principle of non-refoulement . . . is an absolute obligation deriving from the absolute and non-derogable nature of the prohibition of torture."[39] International

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Kunarac & Others, Case No IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 466 (Feb 22, 2001) ("Torture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during an armed conflict The prohibition can be said to constitute a norm of *jus cogens* "); *Filartiga v Peña-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (explaining that the prohibition of torture "has become a part of customary international law")

[38] CAT, *supra* note 12, art 3

[39] Manfred Nowak, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Civil*

(Continued on following page)

law has long recognized that the officer or official who orders torture is as culpable as the soldier or police officer who commits the act of torture.[40] "[T]hose exercising superior authority – including public officials – cannot avoid accountability or escape criminal responsibility for torture . . . committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures."[41] So too, the official who sends a person to another state to face torture shares culpability with whoever in the receiving state orders or commits the torture.

Accordingly, international human rights treaties predating CAT are properly construed to prohibit not only torture itself, but also refoulement to face torture. The U.N. Human Rights Committee (UN HRC), established under the ICCPR and charged with monitoring and encouraging compliance with that treaty, has explained that a state's ICCPR obligation to "respect and ensure" ICCPR rights entails an obligation

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and Political Rights, Including the Questions of Torture and Detention, ¶ 31(a), *delivered to the Commission on Human Rights at the 62nd Session*, U.N. Doc. E/CN 4/2006/6 (Dec. 23, 2005)

[40] *See* GC I, *supra* note 27, art 49, GC II, *supra* note 27, art. 50; GC III, *supra* note 27, art 129, GC IV, *supra* note 27, art. 146

[41] CAT *General Comment No 2*, *supra* note 36, ¶ 26.

not to send a person to another state where that person would face a real risk of torture:

> [T]he [ICCPR] article 2 obligation that States Parties respect and ensure the [ICCPR] rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [prohibition of torture] of the [ICCPR], either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[42]

Thus, the UN HRC has concluded that "States parties must not expose individuals to the danger of torture . . . upon return to another country by way of their extradition, expulsion or refoulement."[43]

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[42] Human Rights Comm (CCPR), *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 12, U N Doc CCPR/C/21/Rev.1/Add 13 (May 26, 2004).

[43] Human Rights Comm (CCPR), *General Comment No 20 Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment*, ¶ 9 (Mar. 10, 1992), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc HRI/GEN/1/Rev.6 at 151 (2003).

Similarly, the European Court of Human Rights has construed article 3 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms as encompassing an obligation of non-refoulement. In *Soering v. United Kingdom*,[44] the European Court of Human Rights held that article 3's "absolute prohibition of torture"[45] proscribed as well the extradition of a fugitive to another State "where there were substantial grounds for believing that he would be in danger of being subjected to torture."[46] Violation of the obligation of non-refoulement would thus lead to "liability incurred by the extraditing [State Party] by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."[47] The European Court reaffirmed this ruling in the context of an attempted deportation for reasons of national security in *Chahal v. United Kingdom*:[48]

> The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading

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[44] *Soering v United Kingdom*, 11 Eur. Ct H R (ser A) (1989)

[45] *Id.* ¶ 88.

[46] *Id.* ¶ 88. *See also* ¶ 91

[47] *Id.* ¶ 91.

[48] *Chahal v United Kingdom*, 23 Eur Ct H R 413 (1996)

> treatment or punishment, irrespective of the victim's conduct. . . . Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible . . . even in the event of a public emergency threatening the life of the nation. . . .
>
> The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. . . . In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.[49]

Accordingly, the non-refoulement principle is an absolute obligation under the European Convention's prohibition of torture.

The non-refoulement principle is also an absolute principle of customary international law. As the Committee against Torture has emphasized, "non-refoulement must be recognized as a peremptory

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[49] *Id.* ¶¶ 79-80

norm under international law, and not merely as a principle enshrined in article 3 of the Convention."[50]

II. THE UNITED STATES HAS UNDERTAKEN TO BE BOUND BY THE INTERNATIONAL PROHIBITION OF TORTURE AND REFOULEMENT TO FACE TORTURE

The United States has undertaken as a matter of both international and domestic law to be bound by the absolute prohibition of torture as well as the absolute principle of non-refoulement. It has done so by ratifying relevant treaties, by enacting domestic law relating to torture and non-refoulement, and by making unequivocal pronouncements on the international stage.

The United States is a State Party to a host of treaties that categorically and without exception ban torture. As early as 1948, the United States joined with other nations of the world in adopting the Universal Declaration of Human Rights,[51] including its article 5 mandate that "[n]o one shall be subjected to torture." In 1955, the United States ratified the four Geneva Conventions,[52] each of which prohibits torture and requires that it be prosecuted as a war

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[50] Comm. against Torture (CAT), *Summary Record of the 624th Meeting on Wednesday, November 17, 2004*, ¶ 52, U.N. Doc. CAT/C/SR.624 (Nov. 24, 2004).

[51] *See* H.R. Con. Res. 185, 105th Cong. (1998) (enacted).

[52] *See supra* note 27.

crime.[53] In 1992, the United States became a State Party to the ICCPR,[54] which requires States Parties "to respect and to ensure" the rights recognized in the ICCPR, including the absolute and non-derogable prohibition of torture.[55] And in 1994, the United States became a State Party to the Convention against Torture, undertaking to comply with the panoply of obligations which that treaty imposes on States Parties so as to prevent, punish and provide redress for torture.[56]

The United States has likewise consented to be bound by the principle of non-refoulement. As noted above, that principle must be understood to be an

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[53] *See* GC I, *supra* note 27, arts. 12, 49-50; GC II, *supra* note 27, arts 12, 50-51; GC III, *supra* note 27, arts 17, 129-30; GC IV, *supra* note 27, arts. 32, 146-47.

[54] *See* United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, International Covenant on Civil and Political Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 1, 2010)

[55] ICCPR, *supra* note 3, art 2 *See also* art 4.

[56] *See* United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#12 (last visited Mar. 2, 2010) While the U.S. ratified CAT subject to two reservations – one regarding the definition of cruel, inhuman or degrading treatment or punishment and another exercising the CAT art. 30(2) option to decline agreement with the arbitration provision of CAT art. 30(1) – neither of these reservations negates the treaty obligation to prevent, punish and provide redress for torture. *Id.*

inherent component of the prohibition of torture; hence, the United States' ratification of treaties banning torture implies a treaty obligation to abide by the principle of non-refoulement. But lest there be any doubt, the United States has unequivocally bound itself to comply with the non-refoulement principle through its ratification of the Convention against Torture,[57] article 3 of which commands that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[58]

The domestic law of the United States reflects these treaty obligations in a number of respects. Presidential Executive Order 13,491 on "Ensuring Lawful Interrogations" orders:

> [I]ndividuals detained in any armed conflict . . . shall in all circumstances be treated humanely and shall not be subjected to . . . torture . . . whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.[59]

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[57] *See id.*

[58] CAT, *supra* note 12, art. 3

[59] Exec Order No 13,491, § 3(a) (Jan 22, 2009), 74 Fed Reg 4,893 (Jan 27, 2009) [hereinafter Exec. Order No. 13,491]

The War Crimes Act of 1996 criminalizes grave breaches of the Geneva Conventions and serious violations of Common Article 3, including torture.[60] A federal anti-torture statute permits the United States to prosecute acts of torture outside the United States, as well as attempts and conspiracies to commit such torture, whenever the alleged offender either is a U.S. national or is present in the United States.[61] The Torture Victim Protection Act provides a civil remedy for victims of torture.[62]

Specifically with respect to the obligation of non-refoulement, the Foreign Affairs Reform and Restructuring Act (FARRA) declares:

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[60] War Crimes Act of 1996, 18 U S C. § 2441 (2006).

[61] *See* 18 U S.C §§ 2340-2340A (2006) The United States has represented internationally that torture offenses committed *within* the United States can be prosecuted under pre-existing domestic law *See* Comm against Torture (CAT), *Consideration of Reports Submitted By States Parties under Article 19 of the Convention, Second periodic reports of States parties due in 1999, Addendum, United States of America*, ¶ 16, U.N Doc. CAT/C/48/Add.3 (June 29, 2005) [hereinafter *Second periodic report of the U.S to CAT*] ("[A]ny act of torture falling within the Torture Convention definition would in fact be criminally prosecutable in every jurisdiction within the United States Such acts may be prosecuted, for example, as assault, battery or mayhem in cases of physical injury; as homicide, murder or manslaughter, when a killing results; as kidnapping, false imprisonment or abduction where an unlawful detention is concerned; as rape, sodomy, or molestation; or as part of an attempt, or a conspiracy, an act of racketeering, or a criminal violation of an individual's civil rights.")

[62] Torture Victim Protection Act, 28 U S C § 1350 note (2006).

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.[63]

To effectuate this policy, FARRA required the promulgation of regulations consistent with the United States' obligations under the CAT non-refoulement provision.[64] In a similar vein, Presidential Executive Order 13,491 ordered a review of U.S. practices with respect to the transfer of individuals to other states "to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture . . .."[65]

The United States has repeatedly reaffirmed to the international community its commitment to be bound by the prohibitions on torture and refoulement to face torture. On September 23, 2009, President Barack Obama appeared before the United Nations General Assembly and reaffirmed the United States' commitment to the prohibition of torture: "On my first day in office, I prohibited – without exception or

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[63] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G., Title XXII, § 2242(a), 112 Stat. 2681-822, codified as 8 U.S.C. § 1231 note (2006).

[64] *See id.* § 2242(b).

[65] Exec. Order No. 13,491, *supra* note 59, § 5(e)(ii).

equivocation – the use of torture by the United States of America. . . . Every nation must know: America will live its values, and we will lead by example."[66] Earlier, in 2006, the United States reiterated to the Committee against Torture its opposition to torture and its commitment to the non-refoulement principle:

> [T]he United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. government.[67]

In a 2004 submission to the Inter-American Commission on Human Rights, the United States represented:

> [The President] has made clear that the United States stands against and will not tolerate torture and that the United States remains committed to complying with its obligations under the Convention Against

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[66] Barack Obama, President of the U S , Responsibility for Our Common Future, Address to the United Nations General Assembly (Sept 23, 2009) (transcript available at http://www.un org/ga/64/generaldebate/pdf/US_en pdf) (last visited Mar 2, 2010).

[67] *Second periodic report of the U S. to CAT*, *supra* note 61, ¶ 6.

> Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Consistent with that treaty, the United States does not expel, return or extradite individuals to countries where the United States believes it is likely that they will be tortured.[68]

In both its Initial Report to the Committee against Torture, and again in its Second Periodic Report to that Committee, the United States affirmed that it "recognize[d] its obligation not to 'expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture'."[69]

CONCLUSION

Under both conventional and customary international law, the prohibition of torture is absolute and non-derogable. So, too, is the obligation to respect the principle of non-refoulement. The United States has undertaken to be bound by these international

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[68] U.S. Department of State, 60 U.S. submission to IACHR regarding detention and treatment of detainees (Dec. 16, 2004), www.state.gov/s/l/2004/78299.htm

[69] Comm. against Torture (CAT), *Consideration of Reports Submitted By States Parties under Article 19 of the Convention, Initial reports of States parties due in 1995, Addendum, United States of America*, ¶ 156, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000); *Second periodic report of the U.S. to CAT*, *supra* note 61, ¶ 30

obligations through its ratification of relevant treaties, its own domestic law, and its repeated pronouncements to the international community.

The petitioner in this case has alleged that, notwithstanding these obligations, officials of the United States government removed him from the United States via Jordan to Syria for the purpose of having him interrogated under torture. If true, these allegations would represent a most grievous violation of the United States' obligations to foreswear complicity in torture and refoulement to face torture. Because of the gravity of these allegations and the critical importance of the obligations alleged to have been violated, *amici* respectfully urge this Court to grant *certiorari* to review the decision below denying petitioner the opportunity to have his claims heard on the merits.

Respectfully submitted,

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No. ~~09~~(6)-923

Supreme Court, U.S.
FILED
MAR 5 - 2010
OFFICE OF THE CLERK

IN THE

United States Supreme Court

MAHER ARAR,

Petitioner,

against

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE REDRESS TRUST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the Redress Trust ("REDRESS"), an international human rights organization that helps torture survivors obtain justice and reparation (the "*amicus curiae*").[1]

Since its establishment in 1992, REDRESS has developed a considerable expertise in advocating on behalf of victims of torture through legal research, policy and litigation. It regularly represents victims of torture directly and acts as *amicus curiae* before national, regional and international courts and human rights bodies throughout the world. REDRESS has particular expertise on the right to an effective remedy and full and adequate reparation under international law and the relationship of these rights with procedural rules, such as immunities, amnesties, statutes of limitation and the 'state secrets' privilege.

This case concerns the alleged responsibility of U.S. officials for their part in exposing the Petitioner, Mr. Maher Arar, to the risk of torture in violation of the absolute principle of *non-refoulement*. The motivation of the *amicus curiae* to participate in this case therefore relates to its grave concern that the absolute prohibition of torture, of which the absolute principle of *non-refoulement* is an integral part, will be undermined if individuals, such as the Petitioner, are denied access to a court in which to argue their case. The right

[1] The parties have consented to the filing of this brief and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

to an effective remedy, including access to justice, is an inherent component of the absolute prohibition of torture. The denial of access to justice would not only have a detrimental impact on the Petitioner in this case, but would also leave violations of the prohibition of torture and the principle of *non-refoulement* unchecked, thus enabling the outsourcing of torture from U.S. territory with impunity.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the alleged 'extraordinary rendition' of the Petitioner, a dual Canadian-Syrian national, who alleges that he was arbitrarily detained in the U.S. before being sent to Syria, without the ability to challenge his removal. In Syria, he alleges that he was subjected to torture and other cruel, inhuman or degrading treatment or punishment for nearly a year before being returned to Canada without charge. The Petitioner alleges that a number of individuals and states bear responsibility for his 'extraordinary rendition.'

The case currently before this Court concerns the alleged responsibility of U.S. officials for their part in the Petitioner's alleged 'extraordinary rendition' through exposing him to the risk of torture in violation of the absolute principle of *non-refoulement*. This principle prohibits the transfer of a person to a place where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The lower courts[2] denied the Petitioner access to

[2] 585 F.3d 559 (2d Cir. 2009), 532 F.3d 157 (2d Cir 2008), 414 F. Supp.2d 250 (E.D.N.Y. 2006).

a court to argue that he had been a victim of such a serious human rights violation.

This *amicus curiae* filed a substantive brief in the court below supporting the Petitioner's right to an effective remedy and to full and adequate reparation under U.S. and international law. It is this same view that moves the *amicus curiae* to present this brief in support of Mr. Arar's Petition for Writ of Certiorari.

This brief raises four issues. First, individuals who have an arguable claim that they have been a victim of 'extraordinary rendition' have the right to an effective remedy and full and adequate reparation, including access to a court. Second, the right to an effective remedy and full and adequate reparation arises in relation to each individual and/or state responsible for the violation; where one responsible entity has provided relief, this does not extinguish the individual's claim against other responsible entities. Third, any restriction of access to a court must not undermine or extinguish the right of access to a court entirely. Finally, access to a court is critical to the remedial process in and of itself.

ARGUMENT

1. A Victim of *Refoulement* Has the Right to Access a Court to Argue His or Her Claim and Receive Reparation

This case concerns the responsibility of U.S. officials for their part in the Petitioner's alleged 'extraordinary rendition,' in violation of the absolute principle of *non-refoulement*. As explained below, the U.S. is

bound to respect the principle of *non-refoulement* and to provide victims with an effective remedy and full and adequate reparation.

A. The U.S. is Required to Observe the Principle of *Non-Refoulement*

The universally recognized absolute prohibition of torture[3] includes the negative duty on states to refrain from torturing and also positive obligations including preventing torture "by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture."[4] This obligation encapsulates the absolute principle of *non-refoulement*, which is

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[3] The absolute prohibition of torture is a *jus cogens* norm and is set out in every major international and regional human rights instrument. *See, e.g.*, International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, A/6316, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also* American Convention on Human Rights art. 5, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter *American Convention*]; and the United Nations [hereinafter *U.N.*] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter *UNCAT*]. *See also de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992), *Soering v. United Kingdom*, Application No. 14038/88 (Eur. Ct. H.R. 1989) at ¶ 88.

[4] *See* U.N. General Assembly, *Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 55th Session*, Item 116(a) of the provisional agenda, A/55/290 Human Rights Questions: Implementation of Human Rights Instruments, (2000) at 27.

an inherent and indivisible part of the prohibition of torture.[5]

Human rights courts and bodies have consistently confirmed the absolute nature of the principle of *non-refoulement*, which allows no limitations, derogation or exceptions,[6] including on national security grounds.[7] It applies to all persons without distinction and the victim's conduct, however "undesirable or dangerous," is irrelevant.[8]

The U.S. is bound to respect the principle of *non-refoulement* for at least four reasons: (i) the U.S. ratified treaties which expressly prohibit the *refoulement* of a person where there are substantial grounds to believe that the individual would be at risk of tor-

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[5] *See, e.g., Chahal v United Kingdom*, Application No. 22414/93 (Grand Chamber Eur. Ct H R. 1996) at ¶ 74.

[6] *See, e.g.*, UNCAT Article 2(2), *supra* note 3; *Chahal*, *supra* note 5; *Dadar v. Canada*, U N Committee against Torture [hereinafter *CAT*], CAT/C/35/D/258/2004 (2005) at ¶ 8.8; HRC General Comment 20, Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.1 (1994) at § 9 [hereinafter *HRC General Comment 20*], HRC General Comment 29, Article 4, Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add 11. at 1 ¶ 7 (2001) [hereinafter *HRC General Comment 29*]

[7] *Chahal*, *supra* note 5, at ¶ 79, *Saadi v. Italy*, Application No 37201/06 (Eur. Ct H. R 2008) at ¶¶ 138 and 141.

[8] *See, e.g., Agiza v. Sweden*, CAT, CAT/C/34/D/233/2003 (2005); *Saadi*, *supra* note 7, at ¶¶ 139-40.

ture;[9] (ii) the U.S. signed the American Convention on Human Rights ("American Convention") on June 1, 1966 which expressly prohibits *refoulement*;[10] (iii) the absolute principle of *non-refoulement* constitutes a *jus cogens* norm, which binds the U.S. as customary international law;[11] and (iv) the U.S. enacted implementing legislation for the UNCAT in the form of the Foreign Affairs Reform and Restructuring Act of 1998, which specifically prohibits *refoulement*.[12]

The absolute principle of *non-refoulement* contains a procedural and a substantive dimension. Where, as the Petitioner alleges, an individual is denied the opportunity to challenge removal through judicial or administrative review, the state commits a procedural violation of the principle of *non-refoulement*, in addition to a substantive breach.[13]

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[9] *See, e.g.*, UNCAT (ratified on Oct. 21, 1994); ICCPR (ratified on June 8, 1992). See also ICCPR art. 7. *See also Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (it is a "settled proposition that federal common law incorporates international law (citing *The Paquete Habana*, 175 U.S 677, 700 (1900))); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos I)*, 978 F.2d 493, 502 (9th Cir. 1992).

[10] *See* American Convention, *supra* note 3, art. 22.

[11] *See, e.g.*, CAT, *Summary Record of the 624th Meeting*, CAT/C/SR 624 (2004), § 51-52; Restatement (Third) of Foreign Relations Law § 702(c) (1987) ("The customary law of human rights is part of the law of the United States to be applied as such by State as well as federal courts.").

[12] *See* Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C 1231(b)(3)

[13] *See Agiza v Sweden, supra* note 8; *Alzery v. Sweden*, HRC, CCPR/C/88/D/1416/2005 (2005).

The principle of *non-refoulement* is breached at the point of transfer. Whether the individual ultimately faces torture is irrelevant for the purposes of establishing liability.[14] In cases where an individual is ultimately tortured, any state involved in the transfer, may incur additional and separate responsibility even if it had no direct involvement in the treatment after the transfer.[15]

The numerous authoritative sources cited above bind the U.S. to respect the principle of *non-refoulement*. These same authorities obligate the U.S. to provide the Petitioner access to a court and an effective remedy.

B. The U.S. is Obligated to Provide an Effective Remedy for Violations of the Absolute Principle of *Non-Refoulement*

Individuals who allege that they have been victims of *refoulement* have the right to an effective remedy and to full and adequate reparation, including access to a court.[16] The right to an effective remedy and full and adequate reparation for torture and other fundamental violations of human rights is a clear, entrenched right under U.S. Constitutional Law (*see* Petition for Certiorari, pp. 11-15), that is also supported by U.S.

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[14] *See, e.g., Agiza, id.*, at ¶ 13.7.

[15] *Ahani v. Canada*, HRC, CCPR/C/80/D/1051/2002 (2004), at ¶ 12.

[16] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 11, A/RES/60/147 (2006).

treaty obligations and customary international law. The right to a remedy has been affirmed by a range of treaties to which the U.S. is a party (*e.g.*, Articles 2(3), 9(5) and 14(6) of the ICCPR; Article 14 of the UNCAT; and Articles 1, 5, 13 and 41 of the American Convention) as well as Articles 8 and 10 of the Universal Declaration of Human Rights and the U.N. Committee against Torture,[17] the U.N. Human Rights Committee[18] and regional human rights courts.[19]

The right to an effective remedy is not only an integral part of the absolute principle of *non-refoulement* but it is also a freestanding right, which is guaranteed, non-derogable,[20] and recognised as "one of the fundamental pillars of the rule of law in a democratic society."[21]

The right to a remedy must be "effective" in practice as well as in law[22] and must be suitable to grant appropriate relief for the legal right that is alleged to

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[17] UNCAT General Comment 2. Implementation of Article 2 by States Parties, CAT/C/GC/2 (2008) at ¶ 15.

[18] *See, e.g.*, HRC General Comment 31, The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add 13 (2004) at ¶¶ 15-17.

[19] *See, e.g., Velasquez Rodriguez Case*, Inter-Am. C H.R (Ser. C) No. 4 (1988) at ¶ 174

[20] HRC General Comment 29, *supra* note 6 at ¶ 14. *See also* Judicial Guarantees in States of Emergency arts. 27(2), 25 and 8 ACHR, Advisory Opinion OC-9/87, Inter-Am. C H.R. (1987) at ¶ 24.

[21] *Castillo Páez v Peru*, Inter-Am. C.H.R., (Ser. C) No. 34 (1997) ¶ 82, *Blake v. Guatemala* (Reparations), Inter-Am. C H R. (Ser. C) No.48 (1999), at ¶ 63.

[22] Judicial Guarantees in States of Emergency, *supra* note 20, at ¶ 24

have been infringed.[23] General Assembly Resolution 60/147 clarifies that States must provide "adequate, effective, prompt and appropriate remedies, including reparation,"[24] and "equal and effective access to justice."[25]

Dissenting from the Second Circuit, Judge Calabresi noted the importance of providing a remedy.[26] Judge Parker echoed this sentiment: "[w]hile I broadly concur with my colleagues who dissent, I write separately to underscore the miscarriage of justice that leaves Arar without a remedy in our courts."[27]

As set out above, individuals who have an arguable claim that they have been victims of *refoulement* have the right to an effective remedy and full and adequate reparation, including access to a court to contest procedural and substantive breaches of the principle of *non-refoulement*.[28]

II. Responsibility Rests with Each State in the Transfer Chain for Violations of the Absolute

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[23] *See, e.g., Velasquez Rodriguez Case, supra* note 19, at ¶¶ 64 and 66; *McTaggart v. Jamaica*, HRC, CCPR/C/62/D/749/1997 (1998); *Aksoy v. Turkey*, Application No. 21987/93 (Eur. Ct H.R 1996) at ¶ 95; and *Aydin v. Turkey*, Application No. 23178/94 (Eur. Ct H. R Grand Chamber 1997) at ¶ 103.

[24] Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 16, Principle 11.

[25] *Id.*, at 2(c)

[26] *Arar v Ashcroft*, 585 F 3d at 630 (Calabresi, J. dissenting)

[27] *Arar v. Ashcroft*, 585 F 3d at 610 (Parker, J dissenting)

[28] *Alzery v. Sweden*, *supra* note 13, at ¶ 13.

Principle of *Non-Refoulement* and Any Torture which Results from the Transfer

A victim of an 'extraordinary rendition' must be afforded an effective remedy and full and adequate reparation by each responsible entity, regardless of the actions or inactions of other responsible individuals and states. Article 47 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the United Nations General Assembly in 2001, confirms as much. In particular, it sets out that:

> 1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
>
> 2. Paragraph 1:
>
> (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
>
> (b) Is without prejudice to any right of recourse against the other responsible States.[29]

The plurality of responsibility does not give rise to joint and several liability, but to separate responsibility in the case of each responsible state. The responsibility of each state may be invoked by the injured party meaning that the victim has the right to an effective remedy in respect of each state.

[29] Responsibility of States for Internationally Wrongful Acts, G.A Res. 56/83, art. 47, A/RES/56/83 (2002); *see also* James Crawford, "The International Law Commission Articles on State Responsibility. Introduction, Text and Commentaries" 272-275 (Cambridge University Press 2008) (citing Article 47).

The underlying rationale for the right to an effective remedy and full and adequate reparation underscores the basis upon which each state is separately responsible for meeting its obligations pursuant to these rights, regardless of the actions or inactions of other states. For example, one of the purposes of reparation for human rights violations has been described as to relieve "the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations."[30]

In addition, if one of the implicated states does not meet its obligation to provide an effective remedy and full and adequate reparation, impunity will ensue, even if other states implicated in the human rights violation meet their obligations.[31] While Canada has provided compensation to the Petitioner for its role surrounding his 'extraordinary rendition,' this does not extinguish the obligation of other entities to provide an effective remedy and full and adequate reparation. In the case presently before this Court, the responsibility at issue is that of U.S. officials for allegedly exposing the Petitioner to a risk of torture in violation of the absolute principle of *non-refoulement*; this was not addressed within the Canadian context.

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[30] Final report submitted by Mr Theo van Boven, Special Rapporteur, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, E/CN.4/SUB 2/1993/8 (1993) at ¶ 137(3)

[31] *Id.*

III. The Right to an Effective Remedy for *Refoulement* Cannot be Undermined or Extinguished

Any proposed restriction on the right to an effective remedy must be assessed on a case-by-case basis, pursue a legitimate aim, and be proportionate and strictly necessary in a democratic society.[32]

The burden of proof on the party seeking the restriction is particularly high and the essence of the right to an effective remedy cannot be removed. Thus, abstract or general assertions of the relevance of "special factors" such as "diplomacy, foreign policy, and the security of the nation"[33] cannot restrict the right to an effective remedy. Rather any purported restriction on these grounds must be concretely advanced by the party seeking the restriction – not the court *ab initio* – and must demonstrate why a particular and identifiable aspect of foreign affairs or national security justifies the restriction sought using the three part test of (1) pursuant to a legitimate aim, (2) proportionality and (3) strictly necessary in a democratic society. While states may introduce adjustments to the practical functioning of the procedures governing judicial remedies; such adjustments must not result in the removal of the fundamental right to an effective rem-

[32] *See generally Tachiona v. Mugabe*, 234 F.Supp.2d 401 (S.D N Y. 2002); *Golder v. United Kingdom*, Application No 4451/70 (Eur Ct. H R. 1975). Restatement (Third) of Foreign Relations Law § 701 (1987).

[33] *Arar v. Ashcroft*, 585 F 3d at 574.

edy altogether since the substance of the right cannot be suspended or derogated from, even in times of emergency.[34]

A. States Alleged to Have Violated the Principle of *Non-Refoulement* Cannot Avoid Accountability by Invoking National Security Concerns

While courts have recognized that the protection of national security may reflect a legitimate aim,[35] it will only be considered as such when its invocation is genuinely tailored to protecting national security interests.[36] National security cannot be used to protect states from embarrassment or to prevent the exposure of illegal activity as security agencies are subject to the same democratic principles of governance as all other state organs.[37]

Courts must test the propriety and legitimacy of the national security claim in the particular circumstances of a case, especially in terms of its impact on the right to an effective remedy.[38] Any assessment of pro-

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[34] HRC General Comment 29, *supra* note 6, at ¶ 14; HRC, *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3 (2006) at ¶ 16.

[35] *See generally, Ždanoka v. Latvia*, Application No 58278/00, (Eur. Ct. H.R. 2004) at ¶ 62.

[36] *Ellsberg v. Mitchell*, 709 F 2d 51, 58 (D C. Cir. 1983).

[37] *See* Principle 2(b), Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, E/CN.4/1996/39 (1996)

[38] *See Tinnelly & Sons Ltd. v. United Kingdom*, Application No. 62/1997/846/1052-1053 (Eur. Ct H.R. 1998) at ¶¶ 78-79

posed restrictions on the right to an effective remedy requires rigorous scrutiny and the burden lies with the party seeking the restrictions to demonstrate why such restrictions pursue a legitimate aim, are proportionate, strictly necessary in a democratic society and do not remove or undermine the essence of the right to an effective remedy. While the conduct of U.S. foreign affairs is "committed by the Constitution to the executive and legislative--'the political'--departments of the government,"[39] this Court has stated that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[40] Indeed, this Court has long recognized that the Constitution confers upon the judiciary the right, if not an obligation, to review executive action which may be unconstitutional even in matters involving national security.[41] Moreover, international human rights courts and bodies have repeatedly rejected the contention that national security interests can be balanced against the absolute principle of *non-refoulement*.[42]

Even where national security interests are considered legitimate, they cannot extinguish the right to an effective remedy altogether but must impact the right in the

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[39] *Igartua-de la Rosa v. United States*, 417 F.3d 145, 151 (1st Cir. 2005).

[40] *Baker v. Carr*, 369 U.S. 186, 211 (U.S. 1962). *See also Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

[41] *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[42] *Chahal*, *supra* note 5, at ¶ 79, *Saadi*, *supra* note 7, at ¶¶ 138 and 141.

least restrictive way.[43] The threshold required for national security to limit judicial remedies is particularly high given the dangers to a democratic society.[44] Thus, in cases which raise national security concerns, courts are tasked with the identification of ways in which to protect potentially sensitive pieces of evidence while ensuring that the essence of the right to an effective remedy is not undermined or removed. The presumption should always be to ensure complete openness of court proceedings and equality of arms as between the parties. However, in appropriate cases, permissible restrictions on the right to an effective remedy may include, for example, hearing pieces of evidence which raise national security concerns in camera.[45] Alternative ways of receiving and hearing privileged information must be explored and used where available;[46] however, proposed restric-

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[43] *See generally* HRC, General Comment 29, *supra* note 6, at ¶ 14

[44] U N Economic and Social Council, U N Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR, Annex, U N. Doc. E/CN.4/1984/4 (1984), at ¶¶ 29-32.

[45] *See also In re NSA Telcoms. Records Litig.*, 564 F. Supp. 2d 1109, 1114 (N.D Cal 2008); *A and Others v. United Kingdom*, Application No. 3455/05 (Eur Ct. H R 2009) at ¶ 92

[46] *See, e.g., Devenney v. United Kingdom*, Application No 24265/94 (Eur Ct. H R. 2002) at ¶¶ 23-29; *Tinnelly*, *supra* note 38, at ¶ 78.

tions must respect the rights of the individual.[47] In the present case, the Second Circuit recognized that "[a]llowing Arar's claims to proceed would very likely mean that some documents or information sought by Arar would be redacted, reviewed *in camera*, and otherwise concealed from the public."[48]

Although certain items of evidence may require redaction or similar measures, each piece of evidence must be assessed carefully with the understanding that this should not lead to the whole matter being removed from the courts, and that in general, any such measures run counter to the right to public disclosure and acknowledgement of the violations.

Indeed, Canadian and English proceedings are instructive in their attempts to deal with sensitive material. For example, the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar produced both a public and a confidential version of their report. Prior to publication, the Canadian government redacted certain paragraphs of the public report on national security grounds resulting in litigation. The Canadian Federal Court provided both an open judgment in which it advanced the standards it applied to reach its decision and a closed judgment in

[47] *See, e.g., Al-Nashif v. Bulgaria*, Application No. 50963/99 (Eur. Ct H.R. 2002), at ¶ 97, *see also* House of Commons Constitutional Affairs Committee, The Operation of the Special Immigration Appeals Commission and the Use of Special Advocates, Seventh Report of Session 2004-2005 (2005) at ¶¶ 44-66.

[48] *Arar v. Ashcroft*, 585 F.3d at 576-77.

which it applied these standards to the facts.[49] Without commenting on the merits of the Canadian decision and whether it fully provided the Petitioner with his right to an effective remedy and to full and adequate reparation - particularly in relation to the right to the truth and public disclosure and acknowledgement of the violations - the Canadian Court's decision demonstrates an attempt to reconcile the value in the public disclosure, with national security concerns by redacting pieces of evidence.

Similarly, in a unanimous decision in *R (on the application of Binyam Mohamed) v. The Secretary of State for Foreign and Commonwealth Affairs,*[50] the English Court of Appeal recently found that seven redacted paragraphs should be published despite the U.K. Foreign Secretary's submission that their publication would be damaging to "intelligence sharing arrangements" between the U.K. and the U.S. and their respective allies.[51] The Lord Chief Justice of England and Wales reasoned that, "each of our judgments proceeded on the principle of open justice and its contribution to the preservation of the rule of law in our society."[52] In advance of being handed down,

[49] Federal Court (Ottawa, Ontario), *"Attorney General of Canada v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar and Maher Arar"*, 2007 FC 766, 24 July 2007, at ¶ 58 (citing *Carey v. Ontario*, [1986] 2 S.C.R. 637, ¶ 84) *See also* Brief of *Amici Curiae* Canadian and International Human Rights Organizations and Scholars in Support of the Issuance of a Writ of Certiorari.

[50] *R (on the application of Binyam Mohamed) v. The Secretary of State for Foreign and Commonwealth Affairs*, [2010] EWCA Civ 65, (Feb. 10, 2010)

[51] *Id* at ¶ 12

[52] *See id* at ¶ 17

draft judgments of the three members of the Court were circulated to counsel, solicitors and the parties on a confidential basis.[53] Following submissions by government lawyers, one paragraph of Lord Neuberger's draft judgment was amended. In a further ruling, the English Court of Appeal required publication of the original draft of the contested paragraph (which contained criticism of the U.K. Security Services) on the basis that "the interests of open justice must prevail."[54]

Extinguishing the right to an effective remedy altogether, including effective access to a court, would constitute a disproportionate restriction.[55] International jurisprudence has consistently and clearly stressed that procedural rules, including amnesty and immunity laws, cannot be used to create a blanket ban on the exercise of the right to an effective remedy in the courts of the state allegedly responsible for the violation, as this would undermine the victim's right to an effective remedy and to full and adequate reparation, and society's right to the truth; and would contribute to a culture of impunity.[56] Dissenting from the Second Circuit *en banc* decision, Judge Parker concluded that

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[53] *Id.* at ¶ 4

[54] *Id.* at ¶ 17.

[55] *See, e.g., Cordova v. Italy* (No 1), Application No. 40877/98 (Eur Ct. H.R 2003) at ¶¶ 54, 60 and 65.

[56] *See, e.g.*, HRC General Comment 20, *supra* note 6, at ¶ 15, *Rodríguez v. Uruguay*, CCPR/C/51/D/322/1988 (1994), at ¶¶ 12 1-12.4, 14; *Chumbipuma Aguirre v. Peru* (Barrios Altos Case), Inter-Am Ct. H R. (Ser. C) No. 87 (2001), at ¶ 41

[57] *Arar v. Ashcroft*, 585 F.3d at 612.

this case "should be permitted to proceed"[57] since the role of the judiciary is "to defend the Constitution... by affording redress when government officials violate the law, even when national security is invoked as the justification."[58] Underscoring "the miscarriage of justice that leaves Arar without a remedy in our courts," Judge Parker noted that "[t]he majority would immunize official misconduct by invoking the separation of powers and the executive's responsibility for foreign affairs and national security."[59] For the reasons stated above, Mr. Arar is entitled to an effective remedy in the U.S. courts.

B. Officials or States Alleged to Have Outsourced Torture in Violation of the Principle of *Non-Refoulement* Cannot Avoid Accountability by Invoking the Principle of Comity in Inter-State Relations

Preventing disclosure of alleged gross human rights violations on the basis of comity in international relations would not meet the strict three-part test for restrictions of the right to an effective remedy and in the present case, would remove the essence of the right entirely. Although the lower courts asserted comity in international relations when denying the Petitioner the right of access to the court, comity does not carry a judicial or legal meaning. Rather, it is better characterized as "rules of politeness, convenience, and goodwill"[60] which are "rules of international con-

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[58] *Id* at 611

[59] *Id.*

[60] Ian Brownlie, *Principles of Public International Law*, Seventh Edition 29 (Oxford University Press, 2008)

duct, not rules of international Law."[61] Comity does not present a legitimate encroachment upon the right to an effective remedy for an alleged violation of the absolute prohibition of torture and the absolute principle of *non-refoulement*.

Moreover, the assessment that comity in inter-state relations would be satisfied by denying the Petitioner access to a court in this case directly displaces the overwhelming commitment of states and the international community to the absolute prohibition of torture and the absolute principle of *non-refoulement* in favor of impunity for the violations alleged by the Petitioner.[62]

IV. Access to a Remedy is Critical to the Remedial Process in and of Itself

The right to an effective remedy, including access to a court, is not only a means by which to seek reparation; the process itself can be an important component of reparation. A number of academic and clinical studies support the conclusion that the exercise of the right of access to a court can have beneficial effects for survi-

[61] Lassa Oppenheim, *International Law: A Treatise 25* (Longmans, Green and Co., 1905)

[62] *See, e.g., Certain Criminal Proceedings in France (Republic of the Congo v. France)* Provisional Measure, Order of 17 June 2003, I. C. J. Reports 2003, at 102.

vors of torture;[63] whereas, a denial of access to justice can compound the existing trauma and thus result in a continuation of the effects of the underlying human rights violations.[64]

Testimonies of victims who have had access to a court in which to argue their case support this conclusion. For example, a torture survivor from El Salvador stated that, "[b]eing a part of the case and having the opportunity to confront these generals with these terrible facts provided me with the best possible therapy a torture survivor could have."[65] Another Salvadoran torture survivor bringing a lawsuit in the U.S. courts explained that he was "looking for a psychological healing of the wounds that torture left on me. I need an explanation and that is why I need a day in

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[63] *See, e.g., Statement of the Medical Foundation*, 23-27, *Refugee Council Parliamentary Briefing*, 36-38, *Refugee Therapy Centre Response by Aida Alayarian*, 39-48 from *Torture (Damages) Bill 2007-08: A Private Member's Bill to Provide a Remedy for Torture Survivors in the United Kingdom: Compilation of Evidence Received following the Call for Evidence launched by Lord Archer of Sandwell QC*, Compiled by The Redress Trust (Jul. 2008) [hereinafter *REDRESS Torture (Damages) Bill Compilation*].

[64] *See, e.g., id., Mary Robertson Expert Report (Traumatic Stress Clinic)*, at 49-53.

[65] *No Safe Haven: Accountability for Human Rights Violators in the United States: Hearing before the Subcomm. on Human Rights and the Law of the H. Comm. on the Judiciary* (2007) (testimony of Dr. Juan Romagoza Arce, Executive Director, La Clinica Del Pueblo and Plaintiff, Romagoza Arce v Garcia). *See also* William Branigin, *Confronting the Past: 6 Honduran Plaintiffs Suing Over 1980's Human Rights Abuses*, Washington Post, Jul 25, 2002.

court."[66] According to the Medical Foundation for the Care of Victims of Torture, for victims "[t]he availability of accessible mechanisms itself can be experienced as acknowledgment and commitment by the State to uphold the right to reparation."[67]

While the healing and recovery process for survivors of torture is complex, lengthy and ongoing, and particular to the individual victim, the inability to access a court can often complicate and even impede the recovery process. Edelman et. al. have found that a situation of impunity, where no sanctions are taken against the perpetrators, can have serious negative consequences for the individual survivor. They argue that impunity functions as a secondary injury which can cause additional trauma.[68] For example, one torture survivor who was unable to bring his case against the state of Kuwait in the English courts due to the Court's interpretation that state immunity applied and who could not bring his claim elsewhere, stated, "I felt completely lost. It was the end of the road for me and it was a terrible feeling."[69]

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[66] Statement of Carlos Mauricio, Center for Justice & Accountability, http //cja org/article php?id=484.

[67] REDRESS Torture (Damages) Bill Compilation, Statement of the Medical Foundation, *supra* note 63, at 25.

[68] Lucila Edelman et al , *La impunidad: Reactivación del trauma psíquico,* Reflexión 1996, at 24-26 *See also* Roger Gurr & José Quiroga, *Approaches to Torture Rehabilitation,* 11 Torture 3, 27 (2001); REDRESS Torture (Damages) Bill Compilation, *supra* note 63, *The need for reparation for torture survivors from a health perspective,* The Parker Institut, Frederiksberg Hospital, Denmark, at 30.

[69] REDRESS Torture (Damages) Bill Compilation, *supra* note 63, Statement of Sulaiman Al-Adsani, at 7.

The Inter-American Court of Human Rights has also recognized the impact of denial of justice on victims of violations of the American Convention, finding that "[t]he damage caused by this situation [of impunity and denial of justice] consists of the impossibility of punishing those truly responsible, which creates a feeling of defenselessness and anguish among the next of kin of the victims."[70]

Again, however, the right to an effective remedy can only play this role if it is exercised in relation to each actor responsible. For example, one of the victims in the Velásquez Rodriguez Case successfully pursued her case against Honduras before the Inter-American Commission on Human Rights. When asked why she had also brought a civil case for compensation against one of the individuals allegedly responsible for her brother's enforced disappearance before the U.S. courts, she explained:

> [t]he case that I brought to the Inter-American Commission and Court of Human Rights was a landmark case because it held the Government of Honduras responsible for the disappearance of my brother . . . But the Government never admitted culpability, no one was ever punished, and the culture of impunity in Honduras was not changed. . . . This case that CJA is bringing . . . at least it will enable us to hold

[70] *Las Palmeras v. Colombia*, Inter-Am C.H.R. (Ser. C) No. 96 (2002), at ¶ 53(a).

> a high-ranking official responsible and thereby begin to pierce the culture of impunity.[71]

Indeed, as discussed above, even where the victim has been provided with a remedy and some form of reparation from one of the states or individuals responsible, he or she is still entitled to an effective remedy and full and adequate reparation from all other entities implicated in the violation of the victim's fundamental rights.

CONCLUSION

For the foregoing reasons, the *amicus curiae* urge this Court to grant the Petition for Writ of Certiorari.

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[71] Statement of Zenaida Velásquez, Center for Justice & Accountability, http://cja.org/article.php?id=469.

Supreme Court, U.S.
FILED
MAR 5 - 2010
OFFICE OF THE CLERK

No. 09-923

In the
Supreme Court of the United States

MAHER ARAR,

Petitioner,

v.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RETIRED FEDERAL JUDGES AS AMICI CURIAE SUPPORTING PETITIONER*

***See inside cover for list of Amici**

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INTEREST OF AMICI[1]

Amici are retired federal judges who share a deep respect for the system of separation of powers and checks and balances that is central to our constitutional democracy. Based on their combined decades of experience on the federal bench, Amici have a particular interest in the preservation of the historic role of the judiciary in that constitutional system as the protector of rights guaranteed by the Constitution.

The Honorable John J. Gibbons served as a judge on the U.S. Court of Appeals for the Third Circuit from 1969 to 1987, and as chief judge of the court from 1987 to 1990.

The Honorable Shirley M. Hufstedler served as a judge on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979.

The Honorable Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.

The Honorable Timothy K. Lewis served as a judge on the United States District Court for the

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[1] Pursuant to Supreme Court Rule 37.2(a), Amici certify that counsel of record of all parties received timely notice of the intent to file this brief in accordance with this Rule and they have consented to the filing of this brief. Letters of consent by counsel of record for the parties have been lodged with the Clerk of this Court. Pursuant to Rule 37.6, Amici certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than Amici or their counsel, has made a monetary contribution to its preparation or submission.

Western District of Pennsylvania from 1991 to 1992, and as a judge on the United States Court of Appeals for the Third Circuit from 1992 to 1999.

The Honorable H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and as a judge on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

The Honorable William S. Sessions served as a judge on the United States District Court for the Western District of Texas from 1974 to 1980, and as chief judge of the court from 1980 to 1987.

The Honorable Patricia M. Wald served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1999, and as chief judge of the court from 1986 to 1991.

SUMMARY OF ARGUMENT

Amici submit this brief in support of the Petition of Maher Arar to address those reasons why it is especially important, from our perspective as former federal judges, that this Court grant certiorari to review the Second Circuit's rejection of Arar's claim for damages under the doctrine of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). We submit that the Second Circuit's decision establishes precedent in that circuit that undermines the role of the federal judiciary in our constitutional system, and could influence other federal courts to do the same.

Petitioner's allegations, which at this stage must be accepted as true, describe the most egregious

violations of his constitutional rights: a conspiracy by federal officials to transfer him to Syria to be interrogated through the use of torture, implemented by those officials through stealth and deception that deprived Arar of the opportunity to seek judicial review to prevent that transfer. The Second Circuit justified its rejection of Arar's claim for damages under the *Bivens* doctrine on the ground that considerations of national security and foreign policy were "special factors" counseling against a damages remedy. The Second Circuit refused to even consider the fact that denying Arar a *Bivens* remedy would leave him entirely without a remedy for the most flagrant violations of his constitutional rights, holding that the court should not exercise its remedial powers absent an express grant of authority from Congress.[2]

Amici submit that certiorari to review the decision below is warranted for three reasons. First, this Court should reaffirm that the Constitution assigns to the judiciary the paramount role as a check against unconstitutional government conduct and that in this role, the judiciary has both the authority and the obligation to craft appropriate remedies for constitutional violations carried out by federal officials. This is especially so when its failure to do so will leave violations of constitutional rights unredressed. The Second Circuit's assertion that it should be left to Congress to decide whether to provide a remedy for violations of individual constitutional rights is

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[2] Before addressing the *Bivens* issue, the Second Circuit affirmed dismissal of Arar's Torture Victim Protection Act ("TVPA") claim, thus leaving *Bivens* as the only available remedy. Amici do not address the TVPA issue.

inconsistent with the Founders' distrust of Congress's capacity and willingness to protect constitutional rights, and their expectation that the judiciary must act as a bulwark against legislative encroachments on these rights. *See* The Federalist No. 78 (Alexander Hamilton), Nos. 10, 48 (James Madison).

Second, certiorari is needed to reject the Second Circuit's reasoning that national security and foreign policy considerations can be invoked as "special factors" to deny relief for violations of constitutional rights. This Court has held repeatedly that courts should exercise their jurisdiction to protect constitutional rights even in the face of national security and foreign policy concerns, or in times of war. As this Court has emphasized, national security and foreign policy cannot be conducted in disregard of constitutional limits. This Court also has rejected arguments, like that adopted by the Second Circuit, that because litigation raises concerns over disclosure of sensitive national security or foreign policy information, the judiciary should abdicate its duty to enforce the Constitution. As this Court has stressed, federal district courts have the competence and tools to protect against such disclosures.

Finally, based on Amici's concerns for the continued efficacy of the *Bivens* remedy as an integral element of the judicial role, we wish to underscore the point made by Petitioner that certiorari is necessary because the Second Circuit departed significantly from the approach outlined in *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), which requires courts to adopt a common law approach and consider all competing factors for and against fashioning a *Bivens* remedy in any particular case. Here, the Second Circuit crafted an

entirely new standard that took no account of any countervailing factors supporting a *Bivens* remedy. *Arar* v. *Ashcroft*, 585 F.3d 559, 573-74 (2009). At stake here is not merely whether a lower court's error will be corrected. Instead, as the circumstances of this case show, the Second Circuit's approach threatens to deprive the *Bivens* remedy of its most central purpose, as articulated by Justice Harlan: A *Bivens* remedy should be available, he said, where it is "damages or nothing" and "at the very least . . . for the most flagrant and patently unjustified sort of police conduct" because "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances." *Bivens*, 403 U.S. at 411 (concurring opinion).

ARGUMENT

I. CERTIORARI IS WARRANTED BECAUSE THE SECOND CIRCUIT'S DECISION UNDERMINES THE JUDICIARY'S ROLE TO ACT AS A CHECK ON CONSTITUTIONAL VIOLATIONS BY THE POLITICAL BRANCHES AND TO FASHION REMEDIES FOR SUCH VIOLATIONS WHERE NO ALTERNATIVE REMEDY IS AVAILABLE

The Second Circuit refused to consider that its denial of a *Bivens* remedy would leave Arar without any remedy for his allegations of the most flagrant violations of his constitutional rights. Instead, it concluded that "it is . . . for the elected members of Congress—and not for us as judges" to decide whether a damages remedy is available for constitutional violations that implicate national security or foreign

policy. *Arar*, 585 F.3d at 565. This deferential vision of the judiciary's role is inconsistent with the role assigned to the judiciary in our system of separation of powers as a check on unconstitutional action by either of the other branches of government. That role requires the judiciary to ensure that there is at least some remedy available for constitutional violations.

As James Madison explained in presenting the Bill of Rights to Congress:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the Legislative or Executive . . . .

1 *Annals of Cong.* 439 (Joseph Gales ed., 1834). *See also Davis* v. *Passman*, 442 U.S. 228, 241 (1979) ("[The Constitution] speaks . . . with a majestic simplicity. One of its important objects is the designation of rights. And . . . the judiciary is clearly discernible as the primary means through which these rights may be enforced.").

In order to carry out its obligation to enforce constitutional rights against congressional or executive abuses, the judiciary must have the power to devise effective remedies. This principle was eloquently enunciated early in our Nation's history by Chief Justice Marshall in *Marbury* v. *Madison*:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first

> duties of government is to afford that protection.
>
> . . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. (1 Cranch) 137, 163 (1803).

Accordingly, the Court has repeatedly affirmed the federal courts' authority to craft remedies adequate to redress violations of individual rights. As stated by the Court in *Franklin* v. *Gwinnett County Public Schools,* 503 U.S. 60, 66 (1992), "[f]rom the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court . . . ." *See also Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 624 (1838) (Noting the "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.").

The *Bivens* damage remedy rests on the important need for the judiciary to exercise its authority to craft remedies for violations of constitutional rights. As Justice Harlan explained in his *Bivens* concurrence, "the judiciary has a particular responsibility to assure the vindication of constitutional interests"—a responsibility that becomes especially pressing whenever alternative remedies are

foreclosed and it is therefore "damages or nothing." 403 U.S. at 407, 410.

The principle articulated by Justice Harlan, that *Bivens* damages are particularly appropriate in the absence of alternative remedies for constitutional violations, has continued to inform this Court's decisions since *Bivens*. *See, e.g.*, *Davis*, 442 U.S. at 242 (holding that "litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights"); *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 (2001) (explaining that a *Bivens* remedy was allowed in *Davis* "chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation"); *Carlson* v. *Green*, 446 U.S. 14, 18-23 (holding that *Bivens* remedy was available in the absence of equally effective alternative remedies). Indeed, even when this Court has denied a *Bivens* remedy, the existence of alternative remedies has played a significant role in its decisions. *See, e.g.*, *Wilkie*, 551 U.S. at 550-54 (noting that, unlike claimants in *Davis* and *Carlson*, claimant had alternative, albeit imperfect, remedies); *Malesko*, 534 U.S. at 72 (noting that "alternative remedies [were] at least as great, and in many respects greater, than anything that could be had under *Bivens*").[3]

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[3] There is only one exception, which is not relevant here. A *Bivens* damages remedy is unavailable to military personnel suing on service-related claims. *See United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983). This exception is based on the Constitution's provision

In light of these precedents, a *Bivens* remedy would be particularly appropriate here: not only is Arar currently without any alternative remedy, but he alleges that federal officials deceived his lawyers and hastily transferred him to Syria to prevent him from availing himself of the congressionally created remedy that might have prevented his transfer.[4] The Second Circuit nevertheless ignored these circumstances and, in defiance of this Court's *Bivens* jurisprudence, refused to even consider the absence of any alternative remedy for Arar's claims. Instead, it held that, absent explicit authorization from Congress for a damages remedy, the judiciary must stay its hand because "it is . . . for the elected members of Congress—and not for us as judges—to decide whether an individual may seek compensation from government officers and employees . . . for a constitutional violation." *Arar*, 585 F.3d at 565.

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conferring on Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces", U.S. Const. art. I, § 8, cl. 14, and Congress's exercise of this authority to "establis[h] a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure" and the need for "a special and exclusive system of military justice." *Stanley*, 483 U.S. at 679 (alteration in original) (quoting *Chappell*, 462 U.S. at 302, 300).

[4] *See* Pet'r's Br. 11-15, 19 (describing the statutory scheme for judicial review of removal orders and noting "the important deterrent function that *Bivens* can play where, as here, federal officials have obstructed an individual's access to an alternative remedy")

This conclusion runs counter to this Court's jurisprudence, which has long affirmed the courts' authority and competence to consider and remedy constitutional wrongs even in the absence of express congressional authorization. *See, e.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 374 (1983) (noting that "[t]he federal courts' power to grant relief not expressly authorized by Congress is firmly established" and "provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, but also the authority to choose among available judicial remedies in order to vindicate constitutional rights") (citing *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)); *see also Davis*, 442 U.S. at 242 (in the absence of any "textually demonstrable constitutional commitment of [an] issue to a coordinate political department" the judiciary has the authority to remedy constitutional violations). As we discuss in the next section, the fact that such violations may implicate matters of national security or foreign policy has never altered this Court's view. *See infra* 12-22.

Moreover, the Founders would have been astounded by the Second Circuit's assertion that it is "for the elected members of Congress—and not for us as judges" to decide whether a damages remedy should be available for constitutional violations. *Arar*, 585 F.3d at 565. The Founders greatly feared the tendency of the legislature to submit to pressures from the popular majority to exceed constitutional limits and oppress minorities. *See* The Federalist Nos. 10, 48 (James Madison). For that reason, they placed the responsibility on the judiciary to act as a "bulwark" against legislative encroachments on constitutional rights. Thus, the Founders explained:

> [T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments . . . .
>
> Th[e] independence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which . . . have a tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

The Federalist No. 78, at 438 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The notion that it should be left to Congress to decide whether to vindicate the fundamental constitutional rights of someone as vulnerable to the "ill humors" of these times as Arar is starkly inconsistent with the Founders' intent and our constitutional traditions.

Finally, this Court has repeatedly held that, absent a clear statement by Congress, courts should avoid construing federal legislation to deny any remedy for a constitutional violation because to do so would raise a "serious constitutional question." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (citing *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975)); *see also INS* v. *St. Cyr*, 533 U.S. 289, 314 (2001).[5] Surely, equally serious constitutional

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[5] *See also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) (Arguing that the Constitution requires that "some court must always be open to

questions would be raised if, as the Second Circuit did here, courts denied a judicial remedy based on Congress's silence.

II. CERTIORARI IS NEEDED BECAUSE THE SECOND CIRCUIT'S HOLDING THAT NATIONAL SECURITY AND FOREIGN POLICY CONCERNS CAN BE INVOKED TO DENY ANY RELIEF FOR THE MOST FLAGRANT CONSTITUTIONAL VIOLATIONS CONFLICTS WITH THIS COURT'S JURISPRUDENCE

The Second Circuit erroneously concluded that national security and foreign policy considerations were special factors counseling against a *Bivens* remedy. *Arar*, 585 F.3d at 572-81. Its reasoning directly conflicts with this Court's jurisprudence.

Since the founding of our Nation, this Court has consistently provided remedies for constitutional violations in national security and foreign policy contexts, even in times of war. In fact, this Court has repeatedly rejected the position—adopted by the Second Circuit in this case—that the mere possibility that a claim may involve courts in sensitive national security or foreign policy matters is sufficient to

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hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation.") (citing Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 345-57 (5th ed. 2003); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953)).

deprive federal courts of their power to remedy constitutional violations. Further, the Court has made it clear that the judiciary should not defer to national security or foreign policy actions by the political branches carried on in violation of the Constitution. Instead, this Court has emphasized that the federal courts are competent to navigate these sensitive matters while preserving both the ability of individuals to vindicate constitutional rights and the confidentiality of sensitive information.

A. The Judiciary Enforces the Constitution Against Executive and Legislative Abuses Notwithstanding Claims that National Security and Foreign Affairs Are Implicated

There is a long tradition, stretching from our Republic's earliest days to the Court's recent terms, of federal courts reviewing the constitutionality or legality of executive and legislative conduct in emergencies and in the domain of national security and foreign affairs. The Second Circuit's decision sharply breaks from this tradition.

In the decades immediately after the Founding, federal courts grappled repeatedly with the legality of executive action in wartime. During the "Quasi-War" with France, the Court affirmed a damages remedy against the captain of the U.S. Frigate *Boston* for the unlawful seizure of a Danish ship. *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170, 176-79 (1804). Chief Justice Marshall held that seizure based on Presidential direction was illegal because it contradicted the terms of military action Congress had authorized. *Id.*; *see also Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1 (1801) (adjudicating a challenge to a U.S. warship's capture of

a foreign vessel during the Quasi-War). The War of 1812 brought before the Court more civil damages actions challenging wartime executive action. In *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), the Court held unlawful a seizure of 550 tons of timber belonging to British subjects. *See also The Julia*, 12 U.S. (8 Cranch.) 181 (1814) (holding that a seizure of American citizens' property sailing under an enemy flag in the War of 1812 was licit under prize law).

During the Civil War, federal courts had to grapple with the legality of executive action in the midst of the most serious and sustained military conflict to occur on American soil. The most significant of those cases reflects the principles that have guided courts even in times of national crises. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), a U.S. citizen successfully challenged his conviction before a military tribunal. The Court rejected the argument that "[a]fter war is originated . . . the whole power of conducting it . . . is given to the President . . . [who] is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration." *Id.* at 18 (citations omitted). Instead, the Court emphasized the importance of the judiciary's role in protecting constitutional rights even in wartime:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great*

> *exigencies of government.* Such a doctrine leads directly to anarchy or despotism . . . .

Id. at 120-21 (emphasis added).

Subsequent wars furnished no cause to derogate from *Milligan's* wisdom. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), despite the government's dire warnings about the repercussions of a steel strike on military and foreign policy during the Korean War, the Court enjoined the President's seizure of steel mills as beyond his constitutional powers. *Id.* at 587-89; *see also Duncan* v. *Kahanamoku*, 327 U.S. 304, 324 (1946) (reading statute declaring martial law narrowly in order to preserve rights).

The Court's recent cases involving detainees designated as "enemy combatants" confirm the federal courts' undiminished role in checking unconstitutional executive and legislative action even when confronting war or grave threats to national security.

In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), the Court rejected arguments that the prosecution of war justified the denial of basic due process to an American citizen captured on an Afghan battlefield. Despite the President's designation of Yaser Hamdi as an "enemy combatant," the Court held that he was entitled to procedural due process rights when challenging that designation. *Id.* at 533, 539 (plurality op.). Rejecting claims that national security considerations required the Court to defer to the President's decision to detain Hamdi, the Court explained:

> [T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the

> broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government.

Id. at 535-36; *see also United States* v. *Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

In *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), the Court reviewed a challenge to the President's power to convene military tribunals to try "enemy combatants." *Id.* at 567. The Court found that the President lacked inherent power to establish commissions that violated the laws of war and the Uniform Code of Military Justice, despite the danger that the petitioner and other terrorism suspects potentially posed to the United States:

> We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. . . . But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction.

Id. at 635.

More recently, the Court struck down under the Suspension Clause legislation limiting the federal courts' jurisdiction to entertain habeas corpus petitions from Guantánamo detainees. *See Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008). Rejecting arguments that recognizing and enforcing such constitutional rights would undermine national security during a time when our Nation faces grave terrorist threats, Justice Kennedy's majority opinion stated in terms equally applicable to the allegations of torture at stake here:

> The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.

Id. at 2277.

As these cases show, even grave threats to the Nation do not serve to eliminate the judiciary's role in policing the legality of the means through which those threats are addressed.

B. Judicial Deference on Matters of National Security and Foreign Policy Does Not Extend to Torture or Other Constitutional Violations

The Second Circuit's assertion that courts should defer to the political branches because national security and foreign policy matters are implicated rests on a mischaracterization of Petitioner's claims that entirely overlooks the fundamental constitutional

violations on which they are focused and on a misreading of this Court's decisions.

The Second Circuit stated that Arar's lawsuit was a challenge to the government's foreign policy of "extraordinary rendition." *Arar,* 585 F.3d at 563, 572. Based on that premise, it maintained that the judiciary must defer to the political branches in this case because Arar's claim challenged a foreign policy of the U.S. government. But Arar does not challenge "extraordinary rendition" as a national security or foreign policy tool; he instead seeks a remedy from the courts for the actions of federal officials who conspired to send him to Syria allegedly with the knowledge and expectation that he would be tortured. Such conduct cannot be part of any national security or foreign policy because it is forbidden by the Constitution,[6] federal statutes,[7] and treaty obligations.[8] In fact the U.S.

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[6] *See, e.g., Rochin* v *California*, 342 U.S. 165, 168-74 (1952); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 155 (1944); *Palko* v *Connecticut*, 302 U.S. 319, 325-26 (1937) (finding that "protection against torture, physical or mental" is among the absolute minimum "fundamental" rights that comprise "the very essence of a scheme of ordered liberty"), *overruled on other grounds, Benton* v. *Maryland*, 395 U.S. 784 (1969) (prohibition against double jeopardy also among fundamental rights); *Brown* v *Mississippi*, 297 U.S. 278, 285-86 (1936)

[7] *See* 18 U.S.C. §§ 2340-2340A; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as a note to 28 U.S.C. § 1350); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (codified as a note to 8 U.S.C. § 1231).

[8] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

government officially maintains to the United Nations that it "does not permit, tolerate, or condone torture . . . by its personnel or employees under any circumstances."[9]

Additionally, the Second Circuit misread this Court's precedents. None of the cases cited by the Second Circuit supports the proposition that federal courts should defer to the political branches in cases where there are claims of constitutional violations because national security and foreign affairs are implicated.

The Second Circuit cites, for example, *United States* v. *Curtiss-Wright Exp. Co.*, 299 U.S. 304, 320 (1936), for the proposition that the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" precludes judicial involvement in foreign affairs matters. *Arar*, 585 F.3d at 575. The Second Circuit overlooked, however, the rest of the quoted sentence, which states that this "power . . . of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." 299 U.S. at 320.

The Second Circuit's reliance on other decisions of this Court is equally misplaced. In none of those cases did this Court decline to review a constitutional claim. For example, the Second Circuit cites

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[9] *See* Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, at 4, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005), *available at* http://www.state.gov/documents/organization/62175.pdf.

Department of the Navy v. *Egan*, 484 U.S. 518, 530 (1988), as support for the judiciary's reluctance to "intrude upon the authority of the Executive in military and national security affairs." *Arar*, 585 F.3d at 575. But *Egan* did not raise constitutional claims; rather, the Court declined to review a security clearance denial, holding that "no one has a 'right' to a security clearance." 484 U.S. at 528.

By contrast, shortly thereafter in *Webster* v. *Doe*, the Court refused to read a federal statute giving the CIA's Director discretion over the Agency's employment affairs to bar review of a claim of wrongful discharge predicated on the First Amendment. Notwithstanding the government's claims that the suit would intrude into the CIA's "affairs to the detriment of national security," 486 U.S. at 604, the Court concluded that reading the statute to bar constitutional claims would raise serious constitutional issues. *Id.* at 603-05. Similarly, the Second Circuit cited *Lincoln* v. *Vigil*, 508 U.S. 182 (1993), in which this Court denied review of the plaintiff's statutory claims but, citing *Webster*, refused to deny review of constitutional claims, instead remanding them for further development.

The Second Circuit also miscited *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), as holding that "foreign policy considerations" constituted special factors foreclosing a *Bivens* remedy. *Arar*, 585 F.3d at 573. *Verdugo-Urquidez* did not involve a *Bivens* claim. Instead, the case addressed a motion to suppress evidence and held that the Fourth Amendment's requirement of a search warrant did not have extraterritorial application. The Court only touched on *Bivens* when it hypothesized that adopting the

dissenting opinion would make such actions available to aliens against U.S. officials acting extraterritorially—with the speculative caveat that "[p]erhaps a *Bivens* action might be unavailable in some or all of these situations due to 'special factors counselling hesitation.'" *Verdugo-Urquidez*, 494 U.S. at 274.

In *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008), cited by the Second Circuit, *Arar*, 585 F.3d at 575, the Court refused to enjoin the transfer of Americans voluntarily present in Iraq to Iraqi authorities for prosecution for allegedly violating Iraqi law, notwithstanding their claim that the Iraqis would torture them. Justice Souter underscored that the Court's decision expressly allowed for the possibility of a different result had the petitioners made a showing that theirs was an "extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." *Munaf*, 128 S. Ct. at 2228 (Souter, J., concurring); *see also id.* at 2226 (majority opinion).

C. Speculative Concerns that Litigation May Involve Classified Information Do Not Justify Abdicating the Federal Courts' Duty to Protect Constitutional Rights

The Second Circuit also raised the concern that the federal courts lack the "institutional competence" to hear *Bivens* claims such as Arar's, because any litigation would "enmesh the courts ineluctably" in inappropriately reviewing intelligence matters and diplomatic relations that would involve "classified information." *Arar*, 585 F.3d at 574-81. As noted above, *supra* 18, these concerns were exaggerated by

the Second Circuit's mischaracterization of Arar's claim as a challenge to "extraordinary rendition," rather than a more focused claim regarding federal officials' complicity in torture. In any event, such speculative fears are not special factors justifying rejection of the *Bivens* claim, as this Court has recently rejected similar government arguments that such fears are reasons for denying review of constitutional claims.

Thus, in *Boumediene*, this Court explicitly rejected the government's argument that its "interest in protecting sources and methods of intelligence gathering" justified denying judicial intervention. Instead, Justice Kennedy relied upon "the expertise and competence of the District Court . . . in the first instance" to protect against such disclosures. 128 S. Ct. at 2276. Similarly, in *Webster*, the Court rejected the government's argument that judicial review of constitutional claims was precluded because it would create a risk that confidential materials might be disclosed to the detriment of national security. Instead, Chief Justice Rehnquist stated that any such concerns were manageable, as "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." 486 U.S. at 604.[10]

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[10] It is also notable that neither the district court nor the Second Circuit addressed the government's state secrets privilege claim and the Second Circuit majority did not take up the government's suggestion at oral argument that it should

III. CERTIORARI IS WARRANTED BECAUSE THE SECOND CIRCUIT'S DEPARTURE FROM THIS COURT'S *BIVENS* JURISPRUDENCE THREATENS TO UNDERMINE RESPECT FOR THE JUDICIAL SYSTEM AND THE RULE OF LAW

The Petition and the Second Circuit dissents already describe the Second Circuit's radical departure from this Court's direction in *Wilkie* that, in considering the appropriateness of a *Bivens* remedy, federal courts must act as common law courts considering all the relevant factors for and against such a remedy.[11] As retired federal judges, Amici wish to underscore the impact that the mistaken analysis adopted by the Second Circuit would have on the judicial system and the rule of law.

The Second Circuit held that in deciding whether to apply a *Bivens* remedy, "we do not take account of countervailing factors" favoring a judicial remedy. *Arar*, 585 F.3d at 573-74, 574 n.7. It also asserted that "the only relevant threshold—that a factor 'counsels hesitation'—is remarkably low" and bars a *Bivens* remedy "whenever thoughtful discretion would even pause to consider." *Id.* at 574. Together, these two principles, if accepted, will likely eviscerate

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remand the case to address that privilege. *See Arar*, 585 F.3d at 638, n.15 (Calabresi, J., dissenting).

[11] *See* Pet'r's Br. at 16-20; *Arar*, 585 F.3d at 600-01 (Sack, J., dissenting); *id.* at 620-22 (Parker, J., dissenting); *id.* at 623-27 (Pooler, J., dissenting).

the courts' ability to award a *Bivens* remedy, even in the face of the most flagrant violation of constitutional rights.

In this case, the Second Circuit's principles meant that the court ignored such factors as the impact of leaving unremedied shocking allegations of constitutional violations, the perverse incentives this result might provide to federal officials, and the message the decision sends about our Nation's commitment to our constitutional values and our treaty obligations to renounce torture under all circumstances. Meanwhile, the Second Circuit's holding that the availability of a remedy for such a constitutional violation should be wholly dependent on the will of popular majorities as reflected in Congress will be viewed with cynicism. Amici fear this decision will breed disrespect for our judicial system and its commitment to the rule of law.

Amici urge this Court to grant review and assure that the *Bivens* remedy continues to be available for flagrant constitutional violations such as those alleged here. Like Justice Harlan, we submit that "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances." *Bivens*, 403 U.S. at 411.

CONCLUSION

For the reasons set forth above, Amici respectfully urge the Court to grant the petition for certiorari.

Dated: March 5, 2010

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